



Banking Regulation

2018

Fifth Edition

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Indonesia

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Introduction

Indonesian banks' main functions are to manage and distribute public funds, which in turn supports national development, economic growth and national stability, towards the increase of people's welfare. Bearing such functions and purposes, the banking sector is one of the most strictly regulated sectors in Indonesia. As of the end of 2017, statistics show there are 115 banks operating as Commercial Banks in Indonesia, with 10 controlling more than 50% of the market. The government has been actively encouraging commercial banks to consolidate their assets and to increase efficiency. By decreasing the number of banks in Indonesia and enlarging the assets of those that remain, the government expects to strengthen the Indonesian banking industry.

Another aspect that has been rapidly developed for the past two years is information technology and the trend for alternative financing, particularly financial technology (“**Fintech**”). Offering simpler alternatives to credit facilities, Fintech has created new challenges to Indonesian banks, especially in credit provision. To avoid disruptions and to synchronise these two sectors, the Indonesian Financial Services Authority (*Otoritas Jasa Keuangan* or “**OJK**”), has issued a number of new regulations.

This article aims to provide its audience an overview of key Indonesian banking regulations and recent regulatory themes and developments of Fintech regulations.

Regulatory architecture: Overview of banking regulators and key regulations

Banking business in Indonesia is primarily governed by Law No. 7 of 1992 as amended by Law No. 10 of 1998 and its implementing regulations.

Originally, the Indonesian central bank, known as Bank Indonesia (“**BI**”), had the function and authority to regulate and supervise the banking industry in Indonesia. This authority was assigned to OJK as of 31 December 2013, except for the monetary function in maintaining Rupiah stability and implementing monetary policy, which are still attached to BI.

More specifically, OJK has the following authorities:

1. regulating and supervising banking institutions covering:
 - (a) licensing for establishment of a bank, opening of a bank's office, articles of association, work plan, ownership, management and human resources, merger, consolidation and acquisition of a bank and revocation of a bank business licence; and
 - (b) business activity of bank; among others, source of funds, provision of funds, hybrid product and activities in the service;

2. regulating and supervising a bank's solvency rating, covering:
 - (a) liquidity, profitability, solvency, asset quality, ratio of minimum capital sufficiency, maximum limit of credit provision, ratio of loan towards deposit and bank reservation;
 - (b) bank report related to bank solvency rating and performance;
 - (c) debtor information system;
 - (d) credit testing; and
 - (e) bank accounting standard;
3. regulating and supervising a bank's prudent aspects, covering:
 - (a) risk management;
 - (b) bank governance procedure;
 - (c) principle of know-your-customer and anti-money laundering;
 - (d) prevention of terrorism and banking criminal acts; and
4. bank examination.

Types of bank

Indonesia recognises three (3) types of banks:

- (a) The Central Bank (BI)

BI has the monetary function to set and implement monetary policies and manage payment systems in Indonesia. It does not engage in conventional banking activities.

- (b) Commercial Bank

Commercial Banks engage in conventional banking activities (such as providing payment traffic services and services such as providing loans and savings) and/or *Sharia* principle banking activities. The latter is not discussed in this article.

Based on their activities, Commercial Banks are divided into four categories called "BUKU".

Commercial Banks with BUKU 1, which is the lowest in terms of Tier 1 Equity (below IDR 1 trillion) are only allowed to engage in general banking activities in Rupiah and act as money changers. In contrast, those with BUKU 2, 3 and 4 are authorised to engage in Rupiah and foreign currency banking activities with a broader scope, including agency activities and cooperation, payment systems and electronic banking, capital participation in non-financial institutions for credit rescue, and capital participation in other financial institutions. The differences are: for those with BUKU 2, their capital participation is limited only to Indonesian financial institutions; for BUKU 3: they are allowed to participate in financial institutions in Asia; whilst for BUKU 4, the participation is open to financial institutions worldwide.

As a general rule, Commercial Banks are prohibited to conduct the following activities:

- capital participation in non-financial institutions (with certain temporary exceptions, for example in the case of recovering a credit failure of a non-financial institution);
- insurance business; and
- those beyond determined by the law.

- (c) Rural Bank (*Bank Perkreditan Rakyat* or "BPR")

BPR focuses on the provision of loans to small and medium enterprises. Unlike a Commercial Bank, BPR does not provide payment traffic services.

Maximum shareholding in a Commercial Bank

A Commercial Bank can be established by Indonesians or jointly between Indonesians and foreigners (either individuals or legal entities), with a maximum foreign participation of 99% of the total issued and paid-up capital.

Nonetheless, individually, a party's maximum ownership in a Commercial Bank under OJK Regulation No. 56/POJK.03/2016 ("**OJKR 56**") is limited to:

- 40% of bank's capital: for banks or other non-bank financial;
- 30% of bank's capital: for a non-financial legal entity; and
- 20% of bank's capital: for an individual.

The above does not apply to Commercial Banks with existing shareholders exceeding the threshold prior to the issuance of OJKR 56, so long as the relevant Commercial Bank has soundness level 1 or 2. However, it is to be noted here that the exception will be voided, and the relevant Commercial Bank must adjust its shareholding composition to the prescribed threshold if any of the following events occurs ("**Triggering Events**"):

- (i) the Commercial Bank's soundness level has deteriorated to Level 3, Level 4 or Level 5 for three consecutive assessment periods; or
- (ii) the relevant shareholder exceeding the threshold voluntarily sells its shares to any other party.

Single presence policy

OJK, through OJK Regulation No. 39/POJK.03/2017 concerning Single Ownership in Indonesian Banking ("**OJKR 39/2017**"), restricts a party to become a controlling shareholder in only one Commercial Bank, and requires the implementation of the so-called single presence policy.

Exemptions apply in the case where it is: (i) a controlling shareholder in two Commercial Banks, where one is a conventional bank and the other is a *Sharia* bank; and/or (ii) a controlling shareholder in two Commercial Banks, where one of them is a joint venture Commercial Bank.

In the event a party purchases shares of a Commercial Bank resulting in it becoming the controlling shareholder in more than one Commercial Bank, it is required to:

- (a) at the latest one year after the closing of the share purchase, (i) merge or consolidate the controlled Commercial Banks, or (ii) establish a Holding Company in the form of a PT; or
- (b) at the latest six months after the closing of the share purchase, establish a holding function (a function established within the controlling shareholder to consolidate its controlled Commercial Banks).

Recent regulatory themes and key regulatory developments

The massive development of Fintech business in Indonesia since 2016 has led the government to regulate Fintech and to introduce a number of Fintech regulations, including on peer-to-peer lending. In the banking sector, BI has recently issued a regulation on Integrated Services of Banking Licensing.

Financial technology (Fintech)

In the past two years, the Indonesian market has seen the rise of technology-based start-up companies that stimulate the rapid development of technology-based transactions (including

technology-based “unicorn”¹ companies such as Go-Jek, Tokopedia and Traveloka²).

To accommodate and support the significant growth of Fintech business in the Indonesian market, OJK and BI have issued a number of regulations to support the healthy growth of the business. The most relevant are briefly discussed below:

1. In 2016, OJK issued OJK Regulation No. 77/POJK.01/2016 on information technology-based loan arrangements (peer to peer lending services on technology information basis – P2P) (“OJKR 77”), laying out requirements applicable for P2P platform administrators or P2P companies, such as, among others: registration and licensing, minimum capital requirement (IDR 1 billion upon registration and IDR 2.5 billion upon application for P2P licence) and maximum 85% foreign ownership. OJKR 77 imposes obligations on P2P companies to ensure security and reliability of their electronic system, protection of confidential information and data security system (with the server located in Indonesia), and to implement an anti-money laundering programme and anti-terrorism funding.

OJKR 77 limits P2P debtors only to Indonesian citizens domiciled in Indonesia, with a maximum loan amount of IDR 2 billion (approximately US\$ 160,000) per debtor.

OJKR 77 distinguishes the P2P agreements into two: (a) agreement between the lender and the P2P Company; and (b) agreement between the lender and the debtor, both to be made in electronic form and signed electronically. The loan agreement between the P2P Company and the lender must contain certain minimum provisions stipulated in OJKR 77, such as: identity of the parties; loan amount; interest rate; default interest/penalty; collateral/security (if any); rights and obligations of each party; and dispute settlement mechanism.

OJKR 77 strictly prohibits a P2P Company from acting as a lender, a debtor or a guarantor, and requires a P2P Company to be liable for any loss caused by the fault or negligence of its directors or employees.

As OJKR 77 imposes a requirement to obtain consent from OJK for any change of shareholder of a P2P Company, any potential investor should take into consideration the timing for obtaining OJK’s consent for acquisition of an existing P2P Company.

2. Following OJKR 77, BI Regulation No. 19/12/PBI/2017 on the Implementation of Financial Technology (“BIR 19”) was introduced by BI, regulating the supervision of all Fintech activities in Indonesia with the following characteristics:

- innovative;
- may cause disruption to existing financial-service products, services, technologies and/or financial business models;
- offers benefits for customers;
- usable in a widespread manner; and
- other criteria(s) as may be determined by BI.

BIR 19 classifies Fintech activities into the following categories:

1. **Payment systems** – covering clearing, final settlement, and payment processing (e.g., blockchains or distributed ledgers technology for fund transfer, electronic money, electronic wallet and mobile payments);
2. **Market support** – facilitating faster and cheaper distribution of information related to financial products and/or services to the public (e.g. provider of data comparison of certain financial services/products);

3. **Investment management and risk management** – e.g., online investment products and online insurance);
4. **Lending, financing/funding and capital raising** – e.g., P2P, financing or crowd-funding; and
5. **Other financial services.**

BIR 19 requires all Fintechs conducting payment system services to register themselves with BI starting from 30 December 2017, with the exemptions of: (a) existing licensed Payment System Service Providers (such as banks); and/or (b) Fintech organisers under the supervision of other authorities (for example, P2P companies, which are under the regime of OJK), provided that they do not perform payment system services.

One of the key concepts introduced by BIR 19 (and its implementing regulations) is the so-called Regulatory Sandbox. The Regulatory Sandbox is BI's supervised platform that can be used by Fintech organisers to test their services/products in a live environment for a certain period, particularly to determine whether the services/products, technology and/or business model to be offered/used are in compliance with the regulations. BI uses this to assess Fintech organisers' capability to meet the requirements, before issuing the necessary business licence/approval/recommendation.

Integrated services of banking licensing

To improve banking licensing services and coordination between BI and OJK, BI (through the issuance of BI Regulation No. 19/13/PBI/2017 on One-Stop Integrated Services for the Operational Affairs of Commercial Banks with Bank Indonesia – enacted on 15 December 2017), introduced an integrated-service facility for the granting of licences related to operational affairs between the Commercial Banks and BI. The licences cover, among others: (i) participation in monetary operations; (ii) issuance of money-market instruments; (iii) BI – Real Time Gross Settlements (BI-RTGS); (iv) BI Script-less Securities Settlement System (BI-SSSS); (v) BI clearing system (SKNBI); (vi) intra-day liquidity facility; and (vii) bank's offshore loan.

Bank governance and internal controls

As institutions that play a significant role in the country's economic welfare, Commercial Banks are highly monitored and heavily regulated by OJK, including on their corporate governance. Through OJK Regulation No. 55/POJK.03/2016 on the Implementation of Commercial Bank's Governance ("OJKR 55"), OJK requires all Commercial Banks to implement good corporate governance principles ("GCG"), among others on minimum requirements for directors, commissioners and other specific internal governance, as briefly discussed below.

Board of Directors ("BoD")

OJKR 55 requires a Commercial Bank to have minimum three directors, one of whom is to be appointed as the President Director, who must be independent from the controlling shareholder(s).

Each Director must pass OJK's fit and proper test requirement and be domiciled in Indonesia. In addition, OJKR 55 requires more than 50% of all members of BoD (majority members of BoD) to have a minimum of five years' experience as a bank's executive officer.

OJKR 55 requires BoD to establish, at least, the following working units:

- (a) internal audit unit;
- (b) risk management unit and risk management committee; and
- (c) compliance unit.

A director of a Commercial Bank is prohibited to, among others:

- hold multiple positions as a director, a commissioner or executive officer in other banks, companies and/or institutions;
- hold more than 25% of issued shares of other companies, either individually or collectively with another director;
- have an extended family member (until the 2nd degree) working at the same Commercial Bank as a director and/or a commissioner;
- grant a general power of attorney to any other party to assign his duties and function as a director; and
- gain a personal benefit from the Commercial Bank.

Board of Commissioners (“BoC”)

A Commercial Bank must have at least three commissioners (one of them is to be appointed as the President Commissioner), with a minimum 50% of the members being independent commissioners. All commissioners must pass OJK’s fit and proper test, and at least one BoC member must be domiciled in Indonesia. The number of BoC members must not exceed the number of BoD members.

Except for the restriction on holding shares in another Commercial Bank or company, the restrictions on BoD apply to Commissioners of a Commercial Bank, *mutatis mutandis*.

To support the effective implementation of its supervisory duties, the BoC is required to establish, at least, the following committees:

- (a) Audit Committee to perform monitoring and evaluation of internal and external audit functions and to provide recommendations to the BoC.
- (b) Risk Monitoring Committee to perform evaluation of risk-management policy and its implementation, the risk-management committee’s and the risk-management unit’s duties, and to provide recommendations to the BoC.
- (c) Remuneration and Nomination Committee to: (i) perform evaluation and recommendation of the remuneration policy and ensure compliance of remuneration policy with the regulation; and (ii) provide recommendations to the BoC on the selection system and procedure of change of the BoD and BoC Audit Committee and Risk Monitoring Committee.

Other GCG:

- (i) conduct portfolio diversification by spreading out its funding distribution;
- (ii) observe compliance with the maximum threshold of credit provision, particularly for the provision of credit to its related parties and large exposures funding;
- (iii) prepare and submit strategic corporate and business plans to OJK;
- (iv) implement information transparency principles on (a) financial and non-financial condition, and (b) products and utilisation of customers’ data;
- (v) ensure sufficiency of management information; and
- (vi) perform periodic self-assessment on the implementation of GCG.

Bank capital requirements

The minimum issued and paid-up capital of a Commercial Bank is IDR 3 trillion (approximately US\$220 million).

To ensure the sufficiency of funds and the soundness level of a Commercial Bank, the regulations set the following requirements:

Risk-based Capital Adequacy Requirements (CAR)

OJK Regulation No. 11/POJK.03/2016 (as amended – “OJKR 11”) requires Commercial Banks to maintain a minimum capital in accordance with their risk profile, as elaborated below:

1. 8% of the weighted assets by risk for Commercial Banks with risk profile ranking 1 (on the basis of Commercial Banks’ soundness level);
2. 9% of the weighted assets by risk for Commercial Banks with risk profile ranking 2;
3. $10\% \leq 11\%$ of the weighted assets by risk for Commercial Banks with risk profile ranking 3; or
4. 11% to 14% of the weighted assets by risk for Commercial Banks with risk profile ranking 4 or 5.

The elements for “weighted assets by risk” are credit risks, operational risk and market risk.

In addition, Commercial Banks are also required to maintain:

1. Capital Conservation Buffer, gradually up to 2.5% of the weighted assets by risk by 1 January 2019;
2. Countercyclical Buffer, between 0%–2.5% of the weighted assets by risk; and/or
3. Capital Surcharge for a Domestic Systemically Important Bank (D-SIB) between 1% to 2.5% of the weighted assets by risk.

OJKR 11 provides that all the above requirements, including CAR, must be fulfilled by the Common Equity Tier 1 (i.e., issued capital and disclosed reserve).

Minimum Loan to Funding Ratio (LFR)

In addition to CAR, to ensure asset liquidity of Commercial Banks for the sake of monetary stability, BI requires every Commercial Bank to maintain its loan-to-funding ratio (“LFR”) within 80%–92% (or 94% if certain conditions are met)). If a Commercial Bank’s LFR exceeds the threshold or is less than the bottom limit, it is required to maintain a certain IDR deposit with BI.

Rules governing banks’ relationships with their customers and other third parties

Commercial Banks are required to carry a trust duty to their customers. Based on this principle, the banking regulations impose a due care obligation on every Commercial Bank in performing its business and managing customers’ funds, some of which are described below:

Customer Due Diligence (“CDD”) and Enhanced Due Diligence (“EDD”)

OJK, through its OJK Regulation No. 12/POJK.01/2017 concerning Implementation of the Anti Money Laundering Program and Terrorism Funding Prevention in the Financial Services Sector (“**OJK Regulation No. 12/2017**”), requires every Financial Service Organiser (including Commercial Banks) to identify, assess and understand the risk of money laundering and/or terrorist funding related to, among others, the customers. Based on OJK Regulation No. 12/2017, Commercial Banks must conduct the CDD and EDD.

(i) CDD

CDD are activities in the form of identification, verification and supervision conducted by Commercial Banks to ensure the transactions are in accordance with the profile, characteristic and/or pattern of customers' transactions.

Commercial Banks are obliged to conduct CDD when:

- they conduct business relations with customer candidates;
- there is a financial transaction with Rupiah currency and/or foreign currency in the minimum amount of or equal to IDR 100,000,000;
- there is a fund transfer;
- there is an indication of a suspicious financial transaction related to money laundering and/or terrorism funding; or
- the Commercial Banks are in doubt on the accuracy of information provided by customer candidates, customers, attorneys and/or beneficial owners.

(ii) EDD

EDD is a more thorough CDD action conducted by Commercial Banks focusing on High Risk Customers, including Politically Exposed Persons. High Risk Customers are customers who, based on their background, identity and history, are considered to have a high risk of conducting activities related to money laundering and/or terrorism funding, while Politically Exposed Persons are persons authorised by their countries or international organisations to conduct prominent functions (among others, heads of state, senior politicians, military officers, important officials in political parties and senior managers of international organisations).

Examples of EDD are, among others: (i) seeking additional information on prospective customers such as their occupation, list of assets, etc., reason for transaction and source of fund and assets; (ii) obtaining approval from the higher-level position before proceeding with the transaction; and (iii) conducting stricter evaluation by adding the evaluation period and observing the customer's transaction pattern.

1. Transparency on Banking Products and Usage of Customers' Personal Data

Under BI Regulation No. 7/6/PBI/2005 concerning Transparency on Banking Product Information and Usage of Customers' Personal Data, Commercial Banks must implement transparency of: (i) information on banking products; and (ii) usage of customers' personal data through their policies and written procedures.

(i) Transparency of Information on Banking Products –

- to provide complete and clear written information on the characteristic of every banking product in Bahasa Indonesia and to deliver the information to the customers verbally or in writing;
- to notify customers on every amendment, supplement and/or reduction to the characteristics of banking products prior to the effectiveness of such amendment, supplement and/or reduction; and
- to provide an information service that is easy to access by public.

(ii) Transparency of Information on Usage of Customers' Personal Data – A Commercial Bank must obtain customers' consent before providing and/or distributing customers' Personal Data to other parties for commercial purposes, including personal data of an individual or a group of people obtained from other parties.

2. Settlement of Customers' Complaints

Based on BI Regulation No. 7/7/PBI/2005 concerning Settlement of Customers' Complaints as amended by BI Regulation No. 10/10/PBI/2008, Commercial Banks must settle every dissatisfaction statement from customers or their representative caused by financial loss that is suspected to be caused by the Commercial Banks' fault or negligence ("**Complaints**") within two days (for verbal Complaints) or 20 days (for written Complaints). Commercial Banks must determine policy and written procedures on the same and establish a specific unit and/or function to handle and settle Complaints.

3. Banking Mediation

Disputes in Indonesia are generally settled through court proceedings or alternative dispute resolutions (i.e., negotiation, mediation and arbitration). Nonetheless, as specifically provided under BI Regulation No. 8/5/PBI/2006 concerning Banking Mediation, disputes resulting from unfulfilled customers' financial claims may be settled through banking mediation.

Banking mediation is conducted by an independent banking mediation institution established by the banking association. Banking mediation may only be conducted for disputes with financial claims in the maximum amount of IDR 500,000,000.

4. Outsourcing

Commercial Banks are generally not allowed to outsource their works, unless the works meet the following criteria set by OJK Regulation No. 9/POJK.03/2016:

- low risk;
- do not require high banking competency and skills qualification; and
- do not directly relate to operational decision-making.

Some examples of the above supporting works are: call centre services; marketing (telemarketing, direct sales or sales representative); secretary or cleaning service.

* * *

Endnotes

1. Valuation exceeding US\$ 1 billion.
2. <https://tirto.id/melihat-perjalanan-4-startup-unicorn-asal-indonesia-cAdQ>.



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Luky Walalangi is an expert and a leading lawyer in M&A, Banking and Finance and Real Estate, with more than 17 years of experience, whom *Asialaw Profiles* cites as “one of the best corporate lawyers in Indonesia”. He is well respected and highly regarded among leading M&A and finance practitioners, including by the top legal surveys, and continues to be recognised by international law journals such as *IFLR 1000*, *Asia Pacific Legal 500* and *Asialaw*.

Luky has been assisting various foreign companies in their complex investments and acquisitions (including assets and portfolio loans acquisitions), real property projects and corporate restructurings in Indonesia. He has also represented leading global banking and financial groups on major finance transactions, bond issuance, sophisticated fund-raising projects as well as a number of major electricity projects in Indonesia. He advises on major strategic acquisitions in Indonesia in various sectors, from traditional company acquisitions to complex assets and portfolio loans acquisitions.



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Miriam Andreta is an Indonesian qualified lawyer, expert and has extensive knowledge in Mergers & Acquisitions, Banking & Finance, Oil & Gas and Antitrust matters. Before joining W&P, she was a partner in one of the biggest firms in Jakarta, with 13 years of experience acting for both foreign and domestic lenders in high-profile syndication financing to Indonesian companies (including issuance of bonds and Medium-Term Notes). She also represents reputable foreign investment companies in upstream and downstream Oil and Gas projects, multinational companies (including various Japanese companies) in their investment Indonesia, as well as Indonesian state-owned companies on various legal matters. On Antitrust matters, she has been advising both local and foreign companies on various antitrust issues relating to their business, as well as assisting their merger notification process.



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