



## **OJK issues regulation on implementation of digital banking services**

*(Oka Anantajaya, S.H., LL.M)*

### **Background**

OJK recently issued OJK Regulation No.12/POJK.03/2018, regarding Implementation of Digital Banking Services by Commercial Banks (“**Digital Banking Regulation**”) as a result of the increased use of information technology by the public, including the use of information technology in financial transactions. As a consequence of financial technology companies now competing with banks, banks are required to also seek out innovative solutions in serving customers, especially given their role as a primary financial services provider. Hence, there is a need for a legal framework for digital banking.

The Digital Banking Regulation distinguishes Electronic Banking Services and Digital Banking Services. Electronic Banking Services is considered as services provided by a bank to obtain information, carry out communications and conduct banking transactions through electronic media. In contrast, Digital Banking Services are considered as electronic banking services developed by optimizing customer data with the purpose of serving customers in a faster, easier and efficient manner, which is to be carried out fully independently by customers, while taking into account security aspects.

### **Electronic Banking Services**

Banks may carry out Electronic Banking Services by utilizing a delivery channel. Only commercial banks are allowed to carry out Electronic Banking Services Banks and are obliged to include an Electronic Banking Services product issuance plan in the bank’s business plan. Furthermore, banks that issues a transactional Electronic Banking Services must secure an approval from the OJK by submitting an application request which must be submitted 2 (two) months prior to implementation.

Organization of the Electronic Banking IT must comply with the OJK provision regarding risk management application in the use of information technology of commercial banks.

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### **Digital Banking Services**

Digital Banking Services are carried out by banks as part of Electronic Banking Services. Digital Banking Services can be provided by banks, pursuant to a partnership agreement between banks and a banking partner (“**Bank’s Partner**”). A Bank’s Partner is categorized as either a financial services institution or non-financial services institution. Banks carrying out Digital Banking Services must form a unit tasked with handling Digital Banking Services with the function set out specifically in the Digital Banking Regulation.

Digital Banking Services that may be carried out by a Bank shall comprise the following:

1. Account administration, such as opening of an account, customers data renewal, closing an account using an electronic media;
2. Transaction authorization covering financial and/or non-financial transactions;
3. Financial management covering financial planning, execution of financial transaction and financial consultation regarding banking services; and
4. Other financial services product approved by OJK.

### **Digital Banking Services through partnership arrangement**

Digital Banking Services by a bank based on a partnership agreement with the Bank’s Partner as stipulated shall include the following:

- a. Information services;
- b. Transactional services; and/or
- c. Other services based on approval by OJK.

A Bank’s Partner shall be in the form of a Financial Services Institution and/or Non-Financial Services Institution if the Digital Banking Services are provided for transactional services. However, if the Digital Banking Services are provided for information services, the Bank’s Partner can only be in the form of a Financial Services Institution.

A Bank's Partner that facilitates financial services based on information technology must already have obtained a license from the OJK or any other relevant agency. Commercial banks are prohibited from acting as a market place in providing transactional services to the Bank's Partner through an application and/or the website owned by the Bank's Partner. Banks are also required to apply at least 2 (two) factors of authentication to verify a financial transaction in the course of a transactional service.

In implementing digital banking services by a bank based on a partnership agreement between a bank and a Bank's Partner, banks are required to have:

- a. Policy and procedure in determining the Bank's Partner; and
- b. A written agreement between the bank and the Bank's Partner in the Indonesian language;

Banks are prohibited from guaranteeing the risks arising from the product and/or services offered by the Bank's Partner in organizing Digital Banking Services based on the partnership agreement. The use of the logo and/or banks' attributes in marketing documents should only be for the purpose of indicating a partnership between the bank and the Bank's Partner.

#### **Other requirements**

Banks that carry out the business of Digital Banking must meet the following requirements:

- a. Rank 1 (one) or 2 (two) on a risk profile ranking based on the latest assessment of a bank's soundness level;
- b. Possess adequate information technology infrastructure and management; and
- c. Be included as a Commercial Bank based on the business activity that can participate in Electronic Banking Services, as set forth in OJK rules.

The bank must implement the Electronic Banking Services plan at least 6 (six months) after receiving OJK approval and must submit a realization report of the Electronic or Digital Banking Services at least 3 (months) after implementation. If the bank does not carry out the Electronic or Digital Services in the time period given, the approval from OJK will be invalid, and the application request will have to be re-submitted.

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### **Ceasing activities; sanctions**

The Digital Banking Regulation also permits the OJK to order banks to cease operation of their Electronic Banking or Digital Services if, based on the evaluation of the OJK, the services are deemed:

- a. not in line with the plan to carry out new activities reported to the OJK or approval and/or recording of products within the OJK; and/or
- b. to potentially bring a negative impact on the performance and reputation of the bank.

In addition, failure to comply with certain provisions of the Digital Banking Regulation may result in administrative sanctions in the form of:

- a. Written warning;
- b. Decrease of the Bank's soundness level by degrading the Bank's governance level when assessing the bank's soundness;
- c. Prohibition from issuing new products or carrying out new activities;
- d. Freezing of certain business activities; and/or
- e. Inclusion of the members of the board of directors, board of commissioners and executive officers in the list of failed candidates through a fit and proper test.

The above sanctions can be imposed without issuing a written warning.



**Report: 2018 Fintech Days Event**

*(Oka Anantajaya, S.H., LL.M)*

On Friday, October 26, 2018, the Financial Services Authority (“OJK”) held an event entitled **2018 Fintech Days Event** at the Trans Resort Bali in Kerobokan, Bali, Indonesia. The speakers of the event came from the OJK, Fintech and E-commerce Companies; experts on the Digital Economy presented topics on the future of peer to peer lending (P2P) as well as e-commerce and fintech business in general. The event was attended by, among others, fintech companies, e-commerce companies, government officials, including law firms. Below are some of the main points given by the speakers of the event:

***Digital Economy: Challenges and Opportunities for Indonesia by Mari Elka Pangestu (former trade minister and economist)***

- a) Digital Economy reduces the transaction fee derived from the market mechanism. Access is easy, affordable and secure;
- b) The current dynamics is from corporate centric to crowd-centric. In the crowd-centric model, there are many buyers and sellers within one platform. One example is Go-Jek; they do not have assets but only manage infrastructure;
- c) Digital developments are improving rapidly in Indonesia, and the mobile broadband price in Indonesia is the lowest in Asia;
- d) Indonesia is five years behind China; Ali Baba started in the e-commerce field and moved into the lending sector. Indonesia is still at the beginning stage while China is at the stage of advanced big data;
- e) In marketing products, the question is how instagramable your product is with regard to *Linked-in* etc. Markets are now digital and even local governments are starting to use e-government to improve services. There is now even branchless banking;

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- f) The main challenge is that many people lack access to the internet, clean water and electricity. Papua only has 47 percent access to electricity, and there is still a lack of access to mobile phones. Logistics and human capital remain notable challenges. Further, internet use in Indonesia is still dominated by social media.

**1. *Fintech Lending : the Future of Indonesian Digital Economy by Henrikus Pasagi of OJK***

- a) There is a grouping in fintech: payment fintech falls under the jurisdiction of Bank Indonesia; crowdfunding, digital banking, capital market, insurance technology (insurtech) fall under the jurisdiction of the OJK; supporting fintech falls under the jurisdiction of Kominfo;
- b) With the existence of fintech lending or also group lending, a borrower is no longer required to have a bankable status;
- c) In addition, there is now blockchain and crypto tech. With the existence of blockchain technology, existing servers are now able to report to one another as to which customers are non-compliant.

**2. *Blockchain Technology in the Future of Digital Economy by Oscar Darmawan of Indodax***

- a) Indodax is a bitcoin trading company in Indonesia and is a pioneer in South East Asia;
- b) Blockchain and bitcoin are not synonymous;
- c) Blockchain is a platform technology that facilitates P2P transactions, eliminating the need for third parties. Therefore, it enables trust, accountability and creates a much more transparent system. The absence of a centralized server authority makes every person an owner of data, and data is retained in the blockchain platform;

- d) Bitcoin is an implementation of blockchain technology; bitcoin is a digital currency based on digital technology;
- e) There are many benefits obtained from blockchain technology; among others, it increases the supply chain transparency, increases the efficiency of payment technology, prevents currency counterfeiting, digitalizes currency and improves the KYC method (e.g. HSBC, MUFG, OCBC have created “know your customer” blockchain prototypes);
- f) Currently BI is conducting an experiment with blockchain technology;

### ***3. Agricultural Fintech by Pamitra Wiweka of TaniFund***

- a) Fintech is also applicable to the agricultural sector;
- b) With the existence of the agricultural fintech, farmers can easily obtain loans or funding from the public or institutions. There are no middlemen, and therefore financial services will be more affordable;
- c) There are also several fintech companies that provide insurance services for the agricultural industry;
- d) The advantage of agricultural fintech lending is that a funding of a maximum IDR 2,000,000,000 can be obtained, and profits earned can be shared equally with investors.

### ***4. The Role of Fintech Enabler by Rhenaldi Kasali***

- a) The old financial system will fall due to shifting trends. Technology is changing our lifestyles and the way we do business;
- b) Banks are considered an antiquated system: carries a high cost, relies on branches, has many employees and has a cumbersome structure;

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- c) There are three eras of fintech:
- *Fintech 1.0 (2010 – 2014)*  
 Disruptive challenge that unbundles the banking service and dismantles services by large banks
  - *Fintech 2.0 (2014 – 2017)*  
 The incumbent's response by collaborative cooperation and bank shall be the place for fintech to place their monies.
  - *Fintech 3.0 (2018 )*  
 This is the era of open banking, cloud computing and algorithm control.
- d) Fintech must provide services to the underserved market because banks cannot provide services to such users. However, interest on loans is still higher from fintech solutions than from bank loans;
- e) Data is very important. Those who control data will control the economy, politics and biology. China is now developing a “social score” based on big data.

### 5. *Electronic Signature by Adi Prawiro of Digi Sign*

- a) The speaker emphasized the importance of certified digital signatures. Certified digital signatures shall only be used to i) sign electronic documents and to conduct electronic transactions; ii) can only be verified electronically, not physically or in paper form; and iii) electronic signatures shall be used to guarantee that an electronic document or electronic transaction possesses legitimate binding legal force.
- b) The function of digital signature;
- Information integration  
 Ensuring that information is not altered/modified during storing or when it is delivered

- Non-Repudiation  
 Ensure that the owner of the information cannot repudiate that such information is his own or has been verified by him
  - Information owner authenticity  
 Ensure that the information is delivered and accepted by the party entitled to it (the authenticity of the sender/recipient of information)
  - Confidentiality  
 Ensure that the information can only be accessed by a legitimate party
- c) The content of a digital certificate comprises i) information on the key holder; ii) information on the certificate issuer; iii) information on the term of the certificate; iv) information on the use of the certificate; and v) the cryptography system used;
- d) Comparative function of signatures

Function	Signature	
	Manual	Certified Electronically
Guarantee of the Signatory's Identity	Yes	Yes
Guarantee of Signatory's Non-Repudiation	Yes	Yes
Approval of Signatory	Yes	Yes
Guarantee of Signatory's Integrity	No	Yes
Guarantee of the Content Integrity	No	Yes

- e) The benefits of using a digital signature are that it is i) time friendly; ii) cost friendly; iii) legally valid; iv) environmentally friendly; and v) secure.

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### Waiving of articles 1266 and 1267

*(MKK Corporate Law Team with research by Aldris Prayogo and Ferawati Natalia)*

When carrying out a business transaction in Indonesia, parties in a contractual relationship may opt to waive articles 1266 and 1267. If you do business in Indonesia for any period of time, there is a strong likelihood that you will see language expressly waiving these articles. Articles 1266 and 1267 of the Indonesian commercial code stipulate that a court order is needed to terminate a contract. It is intuitive, therefore, that waiving these articles makes good sense since getting a court order could inject uncertainty into a transaction as to whether the court will grant such termination or whether such a move will be contested by the counterparty. Concerns over jurisdiction and obtaining a final and binding court decision bring to the table unnecessary uncertainty.

Let's take a look at the ramifications of waiving these articles. For one, allowing the parties to choose their own law and forum of arbitration is an established legal principle encapsulated in the phrase *pacta sunt servanda*. Terminating an agreement can be done outside of court more effectively and efficiently. For avoidance of doubt, a termination letter can be sent to put such action into writing and by having it signed by both parties.

However, there are negative aspects to choosing to waive article 1266 and 1267: by avoiding the court process, unilateral or bilateral termination will not return the parties to their original state if there were losses incurred or outstanding obligations to be performed. Although an *ad hoc* solution may be more time efficient in many cases, sometimes it may leave one or both of the parties dissatisfied with the results.

We may find that inserting such a waiver is advantageous to the creditor and not to the debtor. The creditor may wish to annul a contract upon non-payment by the other party to protect the creditor from further debts, additional late payments, interest, etc. The creditor can thus execute on his own by claiming collateral which had been previously pledged to make up for non-performance in a *parate* execution, which does not require going to court or obtaining a court order. For the creditor, however, it is difficult to see how his interests would be protected by such a unilateral decision.

We may therefore conclude that waiving articles 1266 and 1267 is an option that should be considered; nonetheless, it is a move that may not be in both parties' interests.

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