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Bail-In and Interconnectedness: Strategic Legal Issues in Preventing and Handling Financial System Crises

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ABSTRACT

Law No. 9 /2016 on the Prevention and Resolution of Financial System Crises regulated principles in the prevention and handling of financial system crises that were not previously regulated. Therefore, this study will analyze the implementation of bail in principle and, interconnectedness in the prevention and resolution of financial system crises. This research was conducted using normative juridical method with analytical descriptive approach and data was analyzed by juridical qualitative. Based on the research, the results show that the implementation of bail-in in handling of systemic banks is done by optimizing bank capability through capital surcharge. The interconnectedness between the financial services sector requires a macro prudential policy complementary to micro prudential policy, and integrated supervision of the financial services sector.

Keywords: ***Bail in; Interconnectedness; Prevention and Handling of Financial System Crisis***

INTRODUCTION

The enactment of Law No. 9 of 2016 concerning the Prevention and Handling of Financial System Crises (PPKSK Law) cannot be separated from the need for a legal umbrella that regulates efforts to prevent and handle financial system crises. (Fransisca Ari Indrawati, 2017). The Asian financial crisis in 1997 had a huge impact on economic activity in several Asian countries. Before July 1997, many believed that Indonesia would be affected by the crisis was unlikely. In fact, a month later, the Indonesian economy was affected. The turmoil began with the decline of the rupiah exchange rate against the USD, which caused banks to begin experiencing losses, especially banks that had loans in foreign currencies and did not hedge their loans.

Exchange rate fluctuations, coupled with worsening bank cash flow, have caused banks to face liquidity challenges, resulting in dozens of bank closures, potentially paralyzing the economy. Therefore, bank rescue efforts are a costly option, given the large number of banks that need to be rescued (Bank Indonesia, 2010).

In 2008, the global economic crisis resurfaced, driven by the collapse of the property business in the United States, stemming from the failure of non-bank property loans (subprime mortgages). These loans, with lenient terms, high-interest rates for borrowers with poor credit (subprime lending), and tightened lending policies due to the decline in the subprime mortgage market made it difficult to obtain loans for survival, ultimately leading to bad debts (Moran, Johal, & Williams, 2011). As a result, many financial institutions experienced difficulties.

Lehman Brothers, a major financial institution that acted as an agent or intermediary between investors and potential sub-prime mortgage borrowers, declared bankruptcy after failing to obtain Chapter 11 Protection, an emergency mechanism for US financial institutions experiencing liquidity problems to seek assistance from monetary authorities (Bank Indonesia,

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2010). This crisis in the US triggered a global economic and financial crisis, the impact of which was felt again by countries around the world, including Indonesia.The impact was that national companies that relied on imported raw materials and capital owners had to bear the burden of the weakening exchange rate. At that time, hedging transactions as an anticipatory measure to protect currency values were not yet popular among national companies, although some companies used hedging to mitigate the risk of exchange rate fluctuations. Given the importance of these hedging transactions, Bank Indonesia again issued a series of policies on foreign exchange transactions against the rupiah, both between banks and foreign parties and between banks and domestic parties, to encourage business actors to use hedging transactions as an effort to anticipate losses due to changes in exchange rates (Bank Indonesia, 2010).

The global economic and financial crisis has again sparked panic in global financial markets, including banking. Indonesian banks, which no longer implemented full customer fund guarantees (blanket guarantees) during the crisis, suffered a more severe capital outflow than neighboring countries that implemented full customer fund guarantees. This situation caused banks to experience liquidity difficulties, forcing major banks such as PT Bank Mandiri Tbk, PT Bank BNI Tbk, and PT BRI Tbk to request liquidity assistance from the government, which was used to strengthen capital reserves or fulfill infrastructure credit commitments without disrupting their liquidity (Bank Indonesia, 2010).

The steps taken by the Government and Bank Indonesia as the banking authority to anticipate the crisis include issuing regulations and improving policies. The Government has issued Government Regulation in Lieu of Law (PERPU) No. 2 of 2008 concerning the Second Amendment to Law No. 23 of 1999 concerning Bank Indonesia, which allows current collectible loans to be used as collateral to obtain Short-Term Funding Facilities (FPJP). Second, PERPU No. 3 of 2008 concerning Amendments to Law No. 24 of 2004 concerning LPS, which is used as the legal basis to increase the value of guaranteed customer deposits from IDR 100 million to IDR 2 billion. Third, PERPU No. 4 of 2008 concerning the Financial System Safety Net (JPSK), which is the framework underlying regulations regarding deposit insurance schemes, mechanisms for providing emergency financing facilities by the central bank (lender of last resort), and crisis resolution policies.

The Financial System Safety Net is primarily aimed at crisis prevention, but this framework also includes crisis resolution mechanisms to prevent significant costs to the economy. The objective of the Financial System Safety Net is to maintain financial system stability so that the financial sector can function normally and make a positive contribution to sustainable economic development (Bank Indonesia, n.d.). Over time, the Financial System Safety Net Bill proposed by the Government has undergone changes with the issuance of the PPKSK Law.

Learning from the handling of Bank Century which was declared to have a systemic impact and required the government to rescue it through a bailout, namely a business action that provides money and resources (also known as capital injection) to a bank declared to have failed (Twin, 2019) has provided valuable experience for Indonesia in preventing and handling financial system crises. One of the legal issues that arose in the handling of Bank Century was the debate regarding the criteria for a systemic bank, so that it needed a bailout, considering that there were no regulations that could be used as a legal basis to determine the criteria for a failed bank to be declared systemic or not to have a systemic impact. This Systemic Bank Criteria is

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one of the regulatory substances in the PPKSK Law which provides a definition of a systemic bank. Article 1 Number 5 of the PPKSK Law defines a Systemic Bank as:

"A bank that, due to the size of its assets, capital, and liabilities; the breadth of its network or the complexity of its banking services transactions; and its links with other financial sectors, could result in the failure of some or all other banks or the financial services sector, either operationally or financially, if the bank experiences disruption or fails."

Next, the indicators The criteria for determining Systemic Banks are regulated in Article 5 of POJK No. 2/POJK.03/2018 concerning the Determination of Systemic Banks and Capital Surcharge, namely: Bank size; complexity of business activities; and interconnectedness. In addition, the PPKSK Law uses a new approach in handling financial system crises, namely by prioritizing the use of the bank's own resources and a business approach without using the state budget (bail-in). The change in approach in the PPKSK Law is bail-in and interconnectedness with system This interconnectedness has legal implications for the methods and mechanisms for preventing and handling financial system crises.

In addition to requiring banks to strengthen capital, the implementation of the bail-in principle will encourage banks to prioritize the prudential banking principle in all their activities as an effort to prevent bank failure. Based on the background that has been described, the following problems can be identified: 1) How is the implementation of bail-in in preventing and handling financial system crises, especially in handling systemic banks?; 2) What are the legal implications of financial system interconnectedness for policies to prevent and handle financial system crises?

To support this research, previous research has been conducted on: 1) Banking Infrastructure Readiness in Facing the ASEAN Banking Integration Framework (ABIF); 2) Hedging Transactions in Banking Practices and Their Implications for National Contract Law Reform; and 3) Bank Liquidity Management Regulations through the Mandatory Implementation of the Net Stable Funding Ratio (NSFR) as an Effort to Create Healthy Banking. This research analyzes changes and developments in the principles of the PPKSK Law in preventing and overcoming financial crises as an effort to create healthy and competitive banking.

METHODS

In accordance with the field of legal studies, the approach used in this study is normative juridical, which focuses more on literature studies to examine the implementation of the bail-in principle and its relationship with the financial system (interconnectedness) in preventing and handling financial system crises. This research is also supported by legal history, comparative law, and legal interpretation methods. This research is descriptive and analytical, namely describing and analyzing data obtained in the form of secondary data consisting of primary, secondary, and tertiary legal materials regarding issues related to the bail-in principle and its relationship with the financial system (interconnectedness) in preventing and handling financial system crises. The data analysis used in this study is qualitative juridical data analysis using the power of abstraction and legal interpretation (interpretation), to be further outlined in the form of descriptions (descriptions).

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RESULTS AND DISCUSSION

Implementation of Bail In in the Prevention and Handling of Financial System Crises, Especially in Handling Systemic Banks

Past experiences with crises and failed bank management have made the government and financial authorities aware of the importance of a robust legal framework; strong coordination between financial system authorities, who have traditionally handled issues based on their respective jurisdictions; and the need to implement best practices in preventing and addressing financial system stability issues.

The development of the national financial system, influenced by the global financial system's order and regulations, has also influenced changes in policies and regulations for crisis prevention and management in Indonesia. The global financial crisis prompted G-20 leaders at a meeting in Seoul in 2010 to request the Financial Stability Board (FSB), the International Monetary Fund (IMF), and the Bank for International Settlements (BIS) to develop a macroprudential policy framework to prevent systemic risk in the financial sector. As a follow-up, central banks and financial authorities in several countries have also developed macroprudential policy frameworks. The macroprudential approach to maintaining financial system stability, including through trends in changes in financial institutional arrangements in several countries (Bank Indonesia, 2016). Thus, it is understandable why macroprudential policy is an important legal issue in the PPKSK Law.

Macroprudential policy is relevant in preventing and handling financial system crises, considering that the financial system is insufficient if it only focuses on the health and performance of individual banks or other financial institutions. This is in line with the development of an approach based on interconnectedness, where the failure of one bank can impact other banks or even several banks simultaneously that have financial transactions with that bank. This risk is what is commonly referred to as systemic risk in Bank Indonesia Regulation No. 16/11/2014 concerning Macroprudential Regulation and Supervision, namely "Potential instability resulting from contagion in part or all of the Financial System due to the interaction of factors of size, business complexity, and interconnectedness between institutions and/or market financial interconnectedness, as well as the tendency for excessive behavior from financial actors or institutions to follow the economic cycle (procyclicality)"

Based on a systematic interpretation, it can be concluded that the PPKSK Law utilizes interconnectedness with the financial sector as an approach to address and prevent financial system crises. The provisions in the PPKSK Law focus on banks and do not address non-bank financial institutions. Instead, they emphasize the prevention and management of systemic banks, one indicator of which is interconnectedness with the financial sector.

In addition to the bail-in and interconnectedness approaches, Article 2 of the PPKSK Law lays down the principles for preventing and handling financial system crises, namely the principles of national interest; benefit; justice; integration; effectiveness; efficiency; and legal certainty. Based on these principles, the prevention and handling of financial system crises are expected to be carried out appropriately based on good, coordinated, and mutually supportive cooperation, which will ultimately benefit the interests of the nation and state and realize the ideals of general welfare while prioritizing the interests of the nation, state, and society above all else.

Under the PPKSK Law, the handling of systemic banking problems is prioritized using the bank's own resources (bail-in) and a business approach without using the state budget. If

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these efforts are ineffective, the problem can be addressed with support from Bank Indonesia for liquidity issues and the Deposit Insurance Corporation (LPS) for solvency issues. Bail-in is a resolution strategy adopted from the agreement of members of the International Association of Deposit Insurers (IADI), which defines bail-in as:

"a mechanism to recapitalize a bank inresolution or effectively capitalize a bridge bank, under specified conditions, through the write-down, conversion or exchange of debt instruments and other senior or subordinated unsecured liabilities of the bank in resolution into/for equity or other instruments in that bank, the parent company of the bank or newly formed bridge bank, as appropriate to the legal framework and market capacity" (IADI, 2014).

This principle is further elaborated in POJK No. 14/POJK.03/2017 concerning the Action Plan (Recovery Plan) for Systemic Banks (POJK Recovery Plan), which is a plan to address financial problems (solvency and liquidity) that may occur in Systemic Banks. Article 23 of the POJK Recovery Plan regulates the implementation of bail in which can be in the form of: 1) Adding Systemic Bank capital (capital surcharge) and changing certain types of debt or investment into Systemic Bank capital, which becomes the obligation of the Controlling Shareholder (PSP) and/or ultimate shareholders, and/or 2) Adding Systemic Bank capital and changing certain types of money or investment into Systemic Bank capital that involves other parties.

Strengthening the financial condition of systemic banks by requiring additional capital (capital surcharge) serves to mitigate the negative impact on the stability of the financial system and the economy in the event of a systemic bank failure by increasing the bank's ability to absorb losses. This systemic bank resolution strategy through additional capital is known as an open bank bail-in or a recapitalization of the entity in resolution (Financial Stability Board, 2018b).

In determining recovery options, Systemic Banks can provide Short-Term Liquidity Loans (PLJP) or Sharia-based Short-Term Liquidity Financing to Bank Indonesia as an instrument for managing bank liquidity. This aligns with Bank Indonesia's function as lender of last resort (Zaini, 2013).

Another bail-in strategy is closed bank bail-in, which is the resolution of systemic banks experiencing solvency problems. This method is adapted in LPS Regulation No. 1 of 2017 concerning the Handling of Systemic Banks Experiencing Solvency Problems. Article 6 of the PLPS stipulates that LPS handles systemic banks through several methods, namely: 1) Purchase And Assumption (P&A), namely the transfer of some or all of the bank's assets and/or liabilities to the Recipient Bank. If the value of the transferred liabilities is greater than the transferred assets, the difference is covered in cash by LPS; 2) Bridge Bank, namely a commercial bank established by LPS which is used as a resolution vehicle by accepting the transfer of some or all of the Bank's assets and/or liabilities handled by LPS. If the value of the transferred liabilities is greater than the transferred assets, the difference is covered in cash by LPS; and 3) In accordance with the LPS Law, namely a method of handling systemic banks carried out by adding capital by LPS to the bank with or without the participation of existing shareholders.

The implementation of bail-in that requires further study concerns the conversion of debt or investment into equity (debt-to-equity swap). The author believes that this option needs to be carefully regulated because it will have implications for the position and responsibilities of the creditor as the owner, which will result in different legal consequences. Considering that this option is regulated by law, while the legal relationship between the bank and the fund owner or

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investor is based on an agreement, the legal issue that arises is whether the agreement can be changed without agreement, but rather by referring to voluntary statutory provisions.

However, bail-in is an appropriate mechanism, because in addition to not burdening the State Budget, it will indirectly encourage banks to strengthen capital. This strengthening of the capital structure is further outlined in POJK No. 50/POJK.03/2017 concerning the Obligation to Fulfill the Net Stable Funding Ratio (NSFR), which aims to reduce liquidity risks related to funding sources for a longer period of time with funding sources requiring banks to fund activities with adequate stable funding sources in order to mitigate the risk of funding difficulties in the future. Through the obligation to fulfill the NFSR, banks are expected to be able to achieve a level of bank health so they can compete both nationally and internationally (Handayani & Abubakar, 2018).

Furthermore, banks will be encouraged to be more innovative in developing products and services to increase assets and capital. This change in banking behavior will accelerate national banking's efforts to meet the requirements for Qualified ASEAN Banks (QABs) in preparation for the ASEAN Banking Integration Framework (ABIF) in 2020 (Handayani & Abubakar, 2016).

Legal Implications of Using the Approach *Interconnectedness*on the Urgency of Macroprudential Policy in Preventing and Handling Financial System Crises

International Monetary Fund(IMF) recognizes that since the mid-1990s, countries have become increasingly financially interconnected. IMF give the meaning of interconnectedness is as follows:

"Countries are financial interconnectedness through the asset and liability management (ALM) strategies of their sovereigns, financial institutions, and corporations. This financial globalization hasborught benefits as well as vulnerabilities. In particular, the speed with which illiquidity and losses in some markets can translate into global asset recomposition points to the risks of interconnectedness"(IMF, 2010:5).

Referring to the above definition, it can be interpreted that countries are financially interconnected through asset and liability management strategies of authorities, financial institutions, and corporations. At the global level, this interconnectedness also includes Systematically Important Banks (G-SIBs), namely banks that are globally systemic. In 2018, the Financial Stability Board (FSB) issued a list of G-SIBs using final 2017 data and an assessment methodology designed by the Basel Committee on Banking Supervision (BCBS), which is classified into 4 categories based on the bucket system, namely the methodology used by the Basel Committee on Banking Supervisory (BSBS). One bank (Group BPCE) has been added to the list and two banks (Nordea and Royal Bank of Scotland) have been removed from the list, bringing the total number of banks included in the G-SIBs list to 29 banks (Financial Stability Board, 2018a).

Under Article 17 of the PPKSK Law, the Financial Services Authority (OJK) coordinates with Bank Indonesia to determine Systemic Banks, and the initial determination is made under conditions of normal financial system stability. Subsequently, data updates are conducted periodically, once every six months.

Legal implications of the interconnectedness of the financial sector *(financial interconnectedness)* This new paradigm for handling the financial system crisis was previously elaborated in articles of Law No. 21 of 2011 concerning the Financial Services Authority (OJK

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Law). Article 5 of the OJK Law stipulates, "The OJK functions to organize an integrated regulatory and supervisory system for all activities within the financial services sector."

This integrated supervision is inseparable from the background of the establishment of the OJK Law, namely the process of globalization in the financial system and the rapid development of information technology and financial innovation, which have created a complex, dynamic, and interconnected financial system across financial subsectors, both in terms of products and institutions. It appears that the issue of interconnectedness that has the potential to cause a bank to become systemic is unavoidable. Therefore, integrated supervision is one effort to prevent financial system crises early on.

In addition to integrated supervision across the financial services sector, the relationship with sector The interconnectedness in handling the financial system crisis requires coordination between the Financial Services Authority (OJK) and Bank Indonesia (BI), considering that the handling of the financial crisis is closely related to macroprudential policies, the supervisory and regulatory mandate of which falls under the authority of Bank Indonesia. The explanation of Article 7 of the OJK Law explains that the scope of macroprudential regulation and supervision is the duty and authority of Bank Indonesia. This is reaffirmed in Article 3 Paragraph (2c) of the PPKSK Law, which emphasizes the coordination of monitoring and maintaining Financial System Stability (SSK), including macroprudential and microprudential areas. Neither the OJK Law nor the PPKSK Law defines what is meant by with Macroprudential policy. Explanation of Article 3 Paragraph (2c) explains that macroprudential includes the regulation and supervision of macro-level financial services institutions and focuses on systemic risk in order to promote financial system stability.

For reference and comparison, the IMF defines macroprudential broadly as "macroprudential policy is seen as a policy aimed at maintaining financial stability" and narrowly as "prundential tools set up with a macro (system-wide) lens" (International Monetary Fund, 2011). This definition can be interpreted as a policy aimed at maintaining financial system stability, focused on the overall application of prudential principles.

Referring to the definitions above, the key words to describe macroprudential policy are policies that aim to maintain financial stability, with an orientation towards the financial system as a whole. overall (*system-wide perspectives*) through efforts to build up systemic risk. In other words, macroprudential policy is the application of the prudential principle to the financial system to maintain a balance between macroeconomic and microeconomic objectives (Bank Indonesia, 2016).

Based on the above description, handling financial system crises places macroprudential policies as part of the prevention and management of financial system crises. Bank Indonesia's role, as the mandate holder for macroprudential regulation and supervision, can be divided into two functions: financial system crisis prevention and financial system crisis management.

Based on Articles 16, 17, 20 and 30 of the PPKSK Law, preventive efforts include: monitoring and maintaining financial system stability, coordinating the determination of Systemic Banks and providing Short-Term Liquidity Loans (PLJP) or short-term liquidity financing based on sharia principles. Meanwhile, BI's role in handling financial system crises is regulated in Article 37 which regulates PLJP in conditions of financial system crises, the purchase of SBN owned by the LPS in conditions of financial system crises and support for the Banking Restructuring Program (PRP) whose implementation is carried out by the LPS. In addition to BI's

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functions regulated in the PPKSK Law, of course BI's functions refer to Law No. 23 of 1999 concerning Bank Indonesia, which was last amended by Law No. 2 of 2008. Thus, BI's function as a monetary authority based on the BI Law and BI as the holder of the macroprudential regulatory and supervisory mandate is very relevant in creating financial system stability.

CONCLUSION

The PPKSK Law uses a bail-in approach and eliminates the use of the state budget (APBN) in handling financial system crises, particularly in handling systemic banks. Implementation of this principle takes the form of an open bank bail-in, which involves adding capital (capital surcharge) or converting debt or investment into equity (debt-to-equity swap); and a closed bank bail-in, which involves transferring some or all of a bank's assets and liabilities (Purchase and Assumption) to a Recipient Bank or Bridge Bank (Intermediary Bank), or providing temporary equity participation in accordance with the LPS Law.

Another strategic issue is the interconnectedness with the financial sector, which has the potential to create systemic risk. The interconnectedness of the financial sector has implications for the urgency of macroprudential policies in preventing and addressing financial system crises. Bank Indonesia, as the mandate holder for macroprudential regulation and supervision, plays a role in preventing and addressing financial system crises. In preventative measures, BI monitors and maintains financial system stability and acts as a lender of last resort.

Regarding this bail-in strategy, the author's suggestion is the need for regulations that can accurately translate the debt-to-equity swap mechanism. Furthermore, to optimize coordination between the Financial Services Authority (OJK), as the microprudential authority, and Bank Indonesia (BI), as the monetary and macroprudential authority, cooperation and coordination between the two institutions, as well as among the KKSK members, need to be translated into clear and detailed Standard Operating Procedures (SOPs) as guidelines for each KKSK member in carrying out their functions and roles.

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