http://ejournal.seaninstitute.or.id/index.php/Ekonomi
Jurnal Ekonomi, Volume 12, No 02, 2023
ISSN: 2301-6280 (print) ISSN: 2721-9879 (online)

LEGAL PROTECTION IN BANKS FOR DISCLOSING BANK CONFIDENTIALITY RELATED TO THE CRIME OF MONEY LAUNDERING

Tjoeng Sinta Pertiwi Sandjaja [1], Siti Marwiyah[2], Subekti[3]
Magister Ilmu Hukum Universitas Dr. Soetomo, Kota Surabaya, Jawa Timur[1,2,3]

ARTICLEINFO

Keywords:
Bank,
Bank Secrecy,
Money Laundering,
Customer

E-mail:
spertiwi2016@gmail.com

ABSTRACT

Bank runs business with fiduciary principle, prudential, know your customer and bank secrecy. The money laundering criminal can use bank to save fund. Bank as a financial institute must implements prudential and must keep customer personal information has polemic and must open bank secrecy if money laundering occurred. That's matter become problem is regulation and impelementation of regulation about bank secrecy and law protection for banking and customer because open customer personal information because of money laundering. This riset use normative law riset with statue approach use law material source. Statue approach use with study all regulation. The type of data used is in the form of data obtained from laws and regulations, books, journals, library materials and other written sources related to the problem to be studied. To analyze the data collected from literature search, this research uses qualitative analysis techniques.

1. INTRODUCTION

A bank is an institution that runs a business based on the trust of the public that can collect funds in the form of deposits, distribute to the public in the form of credit and run other banking services. In carrying out its business, banks are required to implement regulations related to banking business. The banking business is based on four important principles, namely the fiduciary principle, the prudential principle, the confidential principle and the know your customer principle. The provision regarding bank secrets is very important for the depository customer and his deposits as well as for the benefit of the bank itself, because if this depositor customer does not trust the bank where he keeps his deposits, of course he will not want to be a customer. The definition of Bank Secrets is regulated in Article 1 number 28 of Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking which reads "Bank Secrets are everything related to information about depository customers and their deposits". The principle of bank confidentiality originated from the purpose of protecting the interests of bank customers in order to be protected by confidentiality regarding their financial situation and customer personal data. In addition, bank confidentiality is also intended for the benefit of the bank because the bank can be trusted by customers to manage their money. Therefore, the principle of secrecy is the soul of the banking system. Regulations regarding the principle of bank secrecy in Indonesia are regulated based on several provisions of laws and regulations, namely Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking which is regulated in Article 40 paragraph (1) which reads: "The Bank is obliged to keep confidential information about the Depository Customer and its deposits except in the case as referred to in Article 41, Article 41 A, Article 42, Article 43, Article 44 and Article 44 A; and the provisions of Article 40 paragraph (2) read "The provisions referred to in paragraph (1) shall also apply to Affiliated Parties". The Indonesian state excludes bank secrets for several purposes such as: taxation (Article 41 paragraph (1)), settlement of bank receivables that have been submitted to the State Receivables and Auctions Affairs Agency / State Receivables Affairs Committee (Article 41 paragraph (1)), justice in criminal cases (Article 42 paragraph (1), civil cases between banks and their customers (Article 43), exchange of information between banks (Article 44 paragraph (1)), request, approval or power of attorney from the depository customer made in writing (Article 44 A paragraph (1)), request for the legal heirs of the deceased depository customer (Article 44 A paragraph (2)).

Based on the background above, this research will discuss the relationship between bank secrets and money laundering crimes as well as legal protection for banks for opening bank secrets related to money laundering crimes.

2. METHOD

This research uses normative legal research methods with a statutory approach using sources of legal materials. Normative juridical research addresses doctrines or principles in legal science. Judging from the formulation of the problem in this study, namely legal protection for banks for the disclosure of bank secrets related to money laundering crimes. In this study, it uses a statue approach which is carried out by examining all laws and regulations related to the legal issue being studied. The statutory approach (statue approach) will be seen by law as a closed system that has the following properties:

a. Comprehensive means that the legal norms that exist in it are logically related to one another;
b. All-inclusive that the set of legal norms is sufficiently capable of accommodating existing legal issues so that there will be no shortage of laws;
c. Systematically that in addition to being intertwined with one another, the legal norms are also systematically arranged.

Normative legal research is also called literature law research, which is research carried out by examining library materials or secondary data consisting of primary legal materials, secondary legal materials and tertiary legal materials. The materials are systematically arranged, studied and then drawn a conclusion in relation to the problem under study. The type of data used is in the form of data obtained from laws and regulations, books, journals, literature materials and other written sources related to the formulation of problems in this study. A data source is a place where data from a study can be obtained. The data sources in this study are primary data sources in the form of official documents and records, namely laws and regulations, reference books, legal journals and mass media related to the problem under study. Soerjono Soekanto wrote in the book Introduction to Legal Research dividing secondary data into three, namely:

a. Primary Legal Materials are binding legal materials. This legal research uses primary legal materials, namely Law of the Republic of Indonesia Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking, Law of the Republic of Indonesia Number 8 of 2010 concerning Prevention and Eradication of Money Laundering Crimes.
b. Secondary Legal Materials are data that provide explanations of primary legal materials which include books, government regulations, banking regulations and other regulations related to money laundering crimes;
c. Tertiary or supporting legal materials are materials that provide instructions or explanations for primary legal materials and secondary legal materials, for example materials from the internet related to banking and money laundering crimes.

Data collection activities in this study are through literature studies derived from laws and regulations and legal field literature related to this research. To analyze the data collected from literature search, this study uses technical qualitative analysis. Qualitative analysis is an explanation of existing theories so that from these theories several things can be drawn that can be used as conclusions in this research.

3. RESULT AND DISCUSSION

Legal protection for depository customers is divided into two types, namely indirect legal protection and direct legal protection. Indirect protection by the banking world against the interests of depository customers is a legal protection provided to depository customers against any risk of loss arising from a policy or arising from business activities carried out by banks. This is an internal precaution and precaution by the bank concerned through the following points:

a. Prudential Principle

According to the provisions of Article 2 of Law Number 10 of 1998, it is stated that Indonesian Banking in conducting its business is based on economic democracy using the principle of prudence. From this provision, it shows that the precautionary principle is one of the most important principles that must be applied or implemented by banks in carrying out their business activities. The precautionary principle requires the bank to always be careful in carrying out its business activities in the sense that it must always be consistent in implementing laws and regulations in the banking sector based on professionalism and good faith.

b. Maximum Credit Limit (BMPK)

The establishment of maximum credit limit provisions, both in Law Number 10 of 1998 and its implementing regulations, is solely aimed at maintaining bank health and increasing bank resilience

through the spread of risks in the form of credit investments to various borrower customers. Moreover, there is a provision for the maximum limit of credit to prevent lending to certain borrowers or groups of borrowers only.

c. Obligation to Announce Balance Sheet and Profit and Loss Protection

The obligation of the bank to announce the balance sheet and the calculation of profit and loss is regulated in Article 35 of Law Number 10 of 1998.

d. Bank Mergers, Consolidations and Acquisitions

In the implementation of mergers, consolidations and acquisitions must pay attention to the interests of all parties, namely the interests of bamk, the interests of creditors, the interests of minority shareholders and bank employees as well as the interests of the people and fair competition in conducting bank business.

Direct Protection

Direct protection by the banking world against the interests of depository customers is a protection provided to customers who store funds directly against the possibility of arising the risk of loss from business activities carried out by banks. Regarding this direct protection can be put forward in two respects:

a. Preferred Rights of Fund Storage Customers

A Preferred Right is a right granted to a creditor to take precedence over other creditors. In the Indonesian banking system, depository customers are creditors who have preferred rights, in the sense that depository customers must take precedence in receiving payments from banks that are experiencing failure or difficulty in fulfilling their obligations.

b. Deposit Insurance Institute

The guarantee of protection for customers of the depository there in connection with the termination of the business activities of a bank is absolutely necessary. To provide protection in the future for the benefit of depository customers of failed banks, especially depositors whose funds are relatively small, it is necessary to create a deposit insurance system.

Bank Secrets as stipulated in Article 1 number 28 of Law Number 10 of 1998 are everything related to information about depository customers and their deposits. Theoretically, this banking secrecy is a form of bank obligation to keep everything related to finance and others confidential from bank customers which according to the norms of the banking world must be kept secret. If contextualized to the previous principle of trust, this confidentiality is closely related to this principle, namely to maintain the trust of depository customers in the bank. In principle, the implementation of business activities in the banking sector cannot be separated from the aspect of trust or generally also referred to as the fiduciary principle. Based on this principle, it is stated that the bank's business is based on the relationship of trust between the bank and its customers. Furthermore, the bank operates with funds from the public deposited on it on the basis of trust so as a consequence, every bank is obliged to maintain the public's trust in it. In almost the same context, the relationship between the bank and the depositor customer is a lending and borrowing relationship between the debtor (bank) and the creditor (the depositor customer) which is based on the principle of trust, with the principle of trust that there will be a burden of fiduciary obligations to the bank towards its customers. In this context, it is then formulated in several aspects of banking obligations to maintain the relationship between banks and their customers which is regulated through law, one of which is related to banking confidentiality. The theories with respect to bank secrets are as follows:

a. Absolutely theory.

According to this theory, banks have an obligation to keep secrets or information about their customers that are known to the bank because of their business activities under any circumstances, highlighting individual interests so that the interests of the State and society are often overlooked.

b. Relative theory of bank secrets.

According to this theory, banks are allowed to open secrets or provide information to their customers, if they are for urgent purposes, for example for the benefit of the State or legal interests. This theory is widely embraced by banks in many countries in the world, including Indonesia. The existence of exceptions in the provisions of bank secrets allows for certain interests an agency or agency is allowed to

request information or data about the financial condition of the customer concerned in accordance with the provisions of the applicable laws and regulations.

In the context of banking confidentiality, Article 47 and Article 47 A regulate provisions regarding violations of bank secrecy intended for a person without order or permission from the Chairman of Bank Indonesia by deliberately forcing the bank or affiliated party to provide information about the depository customer and his deposits. Meanwhile, paragraph (2) explains the validity of confidentiality for members of the Board of Commissioners, Board of Directors, bank employees or other affiliated parties by deliberately providing information that must be kept secret. Article 47 A regulates whether members of the Board of Commissioners, Board of Directors or bank employees deliberately do not provide information that must be fulfilled.

The general explanation of the Prevention and Eradication of Money Laundering Law confirms that the criminal act of money laundering by concealing or disguising the origin of wealth resulting from money laundering crimes is a threat to the stability and integrity of the economic system and financial system. In addition, money laundering is considered to have endangered the joints of social, national and state life based on Pancasila and the 1945 Constitution. Furthermore, the general explanation section of the Prevention and Eradication of Money Laundering Act explains that in the concept of anti-money laundering, the perpetrators and proceeds of criminal acts can be known through tracing to subsequently the proceeds of the crime are seized for the State or returned to the rightful. The crime rate can decrease if the property from the crime controlled by the perpetrator or organization of the crime can be confiscated or seized. In view of this, the Law on the Prevention and Eradication of Money Laundering Crimes aims to be a strong legal foundation to ensure legal certainty so as to increase the effectiveness of law enforcement and the return of assets resulting from criminal acts. The criminal act of Money Laundering is formulated in Article 3 paragraph (1), Article 6 paragraph (1) and Article 7.

In general, the Money Laundering Act groups money laundering offenses into three main offenses as stipulated in the provisions of Articles 3, 4 and 5. In general, money laundering aims to enrich oneself by disguising the origin of the money originated. In Indonesia, this money laundering crime has been regulated in Law Number 8 of 2010 concerning the Prevention and Eradication of Money Laundering Crimes. The acts that become criminal acts of money laundering according to Law Number 8 of 2010 are as follows:

1) Placing, transferring, transferring, spending, paying, giving, entrusting, carrying abroad, changing the form, exchanging for currency or securities or other acts of property known to him or reasonably suspected to be the result of a criminal act with the aim of concealing or disguising the origin of the property.
2) Hiding or disguising the origin, source, location, designation, transfer of rights or actual ownership of property known to him or reasonably suspected to be the result of a criminal act.
3) Receives, controls the placement, transfer, payment, grant, donation, custody, exchange or use of property that he knows or reasonably suspects is the result of a criminal offence.

In practice, money laundering activities include three steps that form the basis of money laundering operations, namely:

a. Placement

The initial act of money laundering is the placement of money, namely the process of entering cash into the financial system. At this stage, the movement of money is very prone to be detected, so to avoid the detection of this pattern, the usual way is to break the money into smaller units so that it is not easily suspected. In addition, there are other ways, namely by placing the money into different money storage instruments such as checks and deposits, smuggling money or property from criminal acts to other countries, placing them electronically and using several other parties in making transactions.

b. Layering

Layering is an activity carried out to keep money earned from the crime. The usual method is to buy assets, invest or by spreading the money through opening bank accounts in several countries. This is where tax havens expedite money laundering.

c. Integration

Integration is an attempt to combine or use assets that have appeared to be legitimate, either to be enjoyed directly, invested into various types of financial products and other material forms, used to finance legitimate business activities or to repay criminal activities. The usual way to do this is by investing in a business activity, selling and purchasing assets and corporate financing.

From Article 2 of Law Number 8 of 2010 concerning the Prevention and Eradication of Money Laundering Crimes, it is known that criminal acts related to money laundering are as follows:

1) Corruption, bribery, narcotics, psychotropics, labor smuggling, migrant smuggling, in the field of banking, in the field of capital markets, in the field of insurance, customs, excise, trafficking in persons, illicit arms trafficking, terrorism, kidnapping, theft, embezzlement, fraud, counterfeiting of money, gambling, prostitution.
2) Criminal acts in the field of taxation, in the field of forestry, in the field of environment, in the field of marine and fisheries;
3) Other crimes that are threatened with imprisonment of 4 (four) years or more committed in the territory of the Unitary State of the Republic of Indonesia and such crimes are also criminal acts according to Indonesian law;
4) Then including property that is known or reasonably suspected to be used and or used directly or indirectly for terrorism activities, terrorist organizations or individual terrorists are equated as the result of a criminal act.

The three money laundering charges illustrate that money laundering is a form of follow-up crime. The concept is an explanation that the criminal act of money laundering occurs after the perpetrator carries out the original crime (predicate crime). The original crime is closely related to the occurrence of money laundering crimes. Romli Atmasasmita in his writing argues that changes in laws related to money laundering crimes because the previous law has many differences in perceptions in the understanding of criminal law experts towards the philosophy, vision, mission and character of money laundering criminal acts because of money laundering crimes which in addition to being serious criminal acts are also unique and have a multi-interpretation character of law both in material law and formal law. (proof). Both the Herzien Inlandsch Reglement (HIR) and the Criminal Procedure Code basically adhere to the Negatief Wettelijkstelsel system or theory of proof. This can be inferred from Article 183 of the Criminal Procedure Code which explains that a judge may not sentence a person unless with at least two valid pieces of evidence and therewith he then obtains a conviction that a criminal act actually occurred and it is the accused who is guilty of committing it. Meanwhile, in the context of the Money Laundering Law, on the other hand, it regulates the type and power of evidence more broadly than the formulation contained in the Criminal Procedure Code. In the Money Laundering Law, in addition to the evidence contained in Article 184 of the Criminal Procedure Code, other evidence is also added as stipulated in Article 73, namely:

1) Evidence as referred to in the criminal procedure law includes:
   a) Testimony of witnesses;
   b) Member description;
   c) Letter;
   d) Instructions;
   e) Defendant's remarks.
2) Other evidence is in the form of information that is spoken, sent, received or stored electronically with optical devices or tools similar to optics and documents.

In addition to the broader form of evidence in order to fulfill the anti-money laundering regime (AML Regime).

In order to meet the demands of law enforcement of money laundering crimes in Indonesia, a special institution was formed that is authorized to carry out prevention of money laundering crimes, namely PPATK (Center for Financial Transaction Reporting and Analysis). Normatively, the duties of PPATK are regulated as stipulated in Article 40 of the Money Laundering Law as follows:

1) Prevention and eradication of money laundering;
2) Management of data and information obtained by PPATK;
3) Supervision of the compliance of the reporting party; and
4) Analysis or examination of reports and information on financial transactions that indicate money laundering and/or other criminal acts as referred to in Article 2 paragraph (1).

The Center for Financial Transaction Reporting and Analysis, hereinafter abbreviated as PPATK, is an independent institution formed in order to prevent and eradicate money laundering crimes.

With the enactment of the Money Laundering Law, banks as one of the financial service providers are required to submit reports to the Financial Transaction Reporting and Analysis Center (PPATK) which includes:

1) Suspicious Financial Transactions;
2) Cash Financial Transactions in an amount of at least Rp.500,000,000.00 (five hundred million Rupiah) or with foreign currency of equivalent value, which are carried out either in one transaction or several transactions within 1 (one) working day; and/or
3) Financial transactions of fund transfers from and to abroad.

The financial system is very vulnerable to money laundering activities. Given that banking is the most dominant in Indonesia's financial system, securing the banking system from money laundering activities deserves special attention. For this reason, Bank Indonesia issued a provision prohibiting bank capital deposits on May 12, 1999 by using funds derived from funds for money laundering purposes. The capital deposit provisions in question apply in the context of establishing a new bank and additional capital deposits. In its application, this provision requires investors to make a statement that funds for capital deposits or additional bank capital deposits do not come from or for money laundering purposes. Furthermore, on June 18, 2001, Bank Indonesia issued a Know Your Customer Principles (KYC) regulation that requires banks to recognize the profile and characteristics of their customers' transactions as an initial effort to prevent banks from being used as a means of money laundering. This is in line with the principles of Prudential Banking based on the Basle Core Principles for Effective Banking Supervision. It's an international practice that requires banks to have risk management guidelines. The risks that will be faced if banks are used for money laundering include operational risks, legal risks, concentration risks and reputational risks.

The purpose of opening bank secrecy for the benefit of law enforcement in money laundering crimes as mentioned earlier is the effectiveness of law enforcement which ultimately reduces the number of crimes related to money laundering. Technically, the opening of imformations that qualify as bank secrets is regulated in Bank Indonesia Regulation Number 2/19/PBI/2000 concerning Requirements and Procedures for Granting Orders or Written Permission to Open Bank Secrets dated September 7, 2000. Article 2 paragraphs (1) and (2) of PBI Number 2/19/PBI/2000 confirms that banks are required to keep everything related to information about depository customers and deposits confidential so that information about customers other than depository customers is not information that must be kept secret by the bank.

4. CONCLUSION

The Bank has a private relationship with the customer in terms of the rights and obligations of the bank and the customer at the time of placement of funds. The Bank is obliged to implement the principle of bank confidentiality regarding customer personal data and information about their deposits. The principle of bank confidentiality is implemented in order to maintain the trust of customers who store funds. With the principle of bank confidentiality, banks have an obligation not to convey any information about customers and their deposits. The stricter the banking secrecy system, the more criminals can use it to secure funds from criminal acts through banking institutions. In anticipation of this, Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking regulates exceptions regarding banking confidentiality. This is to anticipate if there is a criminal act of money laundering carried out by utilizing banking.

Based on several bank secrecy exceptions regulated in banking regulations, banks can disclose information about customers and their deposits to investigators with a mechanism regulated in accordance with the provisions of laws and regulations. In the event of a criminal act of money laundering, the provisions of bank secrets are excluded as stipulated in Article 72 paragraph (2) of the Money Laundering Law which reads "In requesting information as referred to in paragraph (1) for investigators, public prosecutors or judges, the provisions of laws and regulations governing bank secrets and confidentiality of other financial transactions do not apply".

REFERENCES

[1] Andi Hamzah, Criminal Procedure Law, (Jakarta:Sinar Grafika, 2011)
[2] Hermansyah, Indonesian National Banking Law, (Jakarta: Prenada Media Group, 2020)
[3] Muhammad Djumhana. Principles of Indonesian Banking Law, (Bandung: Citra Aditya Bakti, 2008)
[4] Rachmadi Usman, Aspects of Banking Law, (Jakarta: Gramedia Pustaka Utama, 2001
[5] Resi Pranacitra, Bank As A Tool of Economic Engineering Secret Banking Law Series (Yogyakarta : Lautan Pustaka, 2019)
[6] Theodorus M. Tuanakotta, Forensic Accounting & Investigative Auditing, (Jakarta: Salemba Empat, 2010)
[7] Law of the Republic of Indonesia Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking
[8] Law of the Republic of Indonesia Number 8 of 2010 concerning the Prevention and Eradication of Money Laundering Crimes
[9] Romli Atmasasmita, Law of the Republic of Indonesia Law Number 8 of 2010 concerning the

Prevention and Eradication of Money Laundering Crimes, Papers, National Seminar on the Renewal of the Criminal Code & The Criminal Code of No End of Life: Questioning the Fate of the RKUHP and the RKUHAP Study of Money Laundering Crimes from the Angle of Criminal Law Theory and Practice. (Surakarta : Faculty of Law, Sebelas Maret University, September 10, 2013)

[10] https://nasional.tempo.co/read/1571851/penjelasan-tindak-pidana-pencucian-uang-dan-asal-usulnya

[11] https://sikapiuangmu.ojk.go.id/FrontEnd/CMS/Article/10470