

IS THE AGREEMENT WITH FINTECH SERVICES VALID?

Merlin Swantamalo Magna
Faculty Of Law, Universitas Surakarta
Email: merlin@unsa.ac.id

Abstract

The industrial revolution 4.0 was marked by the birth of economic globalization supported by significant technological developments. Rapid progress is evidenced by the increasingly diverse creative and innovative business ideas, which are in the financial sector. Financial institutions in Indonesia are also increasingly developing along with the economic growth rate, which can be seen with a variety of variations of financial instruments circulating in the community, both in the banking sector and in the non-banking sector. One of them is the emergence of Financial Technology that makes it easy for the public to conduct banking activities. The facilities offered are not without problems, because they need a legal umbrella as an effort to provide legal certainty to be able to support a conducive business climate. This paper tries to analyze the validity of the agreement that occurs when using various fintech services in Indonesia.

Keywords : Agreement, Civil Code, Financial, Fintech.

INTRODUCTION

Banking provides a major contribution to the development of the economy in Indonesia, where its existence aims to support the implementation of national development in order to improve equity, economic growth and national stability towards improving the lives of many people¹. As an agent of development, a bank becomes a financial intermediary whose activities divert funds from parties with excess funds or surplus economic units to those who lack funds or deficit economic units², making banking

activities a risky business activity (full risk business) because most of their activities rely on deposits from public funds³. Therefore, it is important to find out about the smooth receipt of funds from the community and the provision of credit by banks. At present, the level of lending in Indonesia is classified as slowing down⁴.

³ Zaini Zulfi Diane, 2014, *Aspek Hukum dan Fungsi Lembaga Penjamin Simpanan*, Bandung: Kemi Media, Pg. 31

⁴ Bank Indonesia (BI) recorded bank credit slowing in June 2019. Credit distribution was recorded at Rp5,495.9 trillion or grew 9.9%, while in May 2019 it was recorded at 11.1%. In the Circulated Money Report for the period of June 2019, it was stated that the slowdown in lending occurred in both corporate and individual debtors. See: Bank Indonesia "Uang Beredar Tumbuh Melambat pada Juni 2019", <http://www.bi.go.id/> Akses 05/08/2019, at 07.46 WIB.

¹ Djoni S. Gazali, Rachmadi Usman, 2016, *Hukum Perbankan*, Jakarta: Sinar Grafika, Pg. 39

² Pasal 1 Undang-Undang Nomor 10 Tahun 1998 tentang Perubahan Atas Undang-Undang Nomor 7 Tahun 1992 tentang Perbankan

The era of big data is a disruptive era that makes almost everything digitized, which ultimately demands speed, accuracy and efficiency, leading to the concept of sharing-economy, in which capital owners and citizens collaborate to create services, production and production that are cheaper, easier and efficient. This innovation also affects the financial industry and governance, by bringing up financial technology (fintech) on various platforms that can be felt by the public⁵. Bank Indonesia explained that financial technology is the result of a combination of financial services and technology that ultimately changes the business model from conventional to moderate⁶.

According to The National Digital Research Center (NDRC) in Dublin, Ireland, defining fintech as "innovation in financial services" or innovation in the financial sector that gets a touch of modern technology. Financial transactions through fintech include payments, investments, money lending, transfers, financial plans and comparison of

⁵ Elshabyta Auditya Bintaro, "*Fintech and Cashless Society: Sebuah Revolusi Pendongkrak Ekonomi Kerakyatan*" in Essay Booklet; The Transformative Power of Fintech yang dipresentasikan pada 28 September 2018, FEB UGM, Yogyakarta, Pg. 2.

⁶ Bank Indonesia explained that financial technology changed the people who originally had to pay face to face and brought some cash, now can make long-distance transactions by making payments that can be done in seconds. See: <http://www.bi.go.id/> Accessed August 5th 2019, at 08.13 WIB

financial products⁷. Fintech comes with various types of businesses, including Payment Chanel System, Peer to Peer (P2P), Lending, Crowdfunding and others. The most dominant fintech business performer in Indonesia is payment. Payment system is an electronic service that replaces currency and demand deposits as a means of payment, such as e-money and bitcoin⁸. For Indonesia, the presence of fintech has its own place for its users, because there are currently 113 registered and licensed fintech operating companies⁹. This shows that there is an improvement in the technology system in service provision compared to the existing system. The present fintech phenomenon is a warning to conventional institutions in the financial sector in terms of their tasks and responsibilities.

The efficiency and effectiveness which are the selling points of fintech by this startup

⁷ Ernama Budiarto, Hendro S., 2017, "Pengawasan Otoritas Jasa Keuangan Terhadap Financial Technology (Peraturan Otoritas Jasa Keuangan Nomor 77/POJK.01/2016)", *Diponegoro Law Journal*, Vol. 6 No.3, Pg. 1

⁸ Alvani Amaerita Harefa, Posma Sariguna Johnson Kennedy, 2018, "Financial Technology, Regulasi dan Adaptasi Perbankan di Indonesia", *Fundamental Management Journal* ISSN: 2540-9220(online) Vol. 3 No. 1, Pg. 2.

⁹ The Financial Services Authority noted that as of May 2019, there were a total of 113 companies registered and licensed as fintech providers in Indonesia. Among them are Dana, Investree, UangTeman, Tokomodal. And appealed to the public to use the services of fintech that has been registered / licensed from the FSA. See: <http://ojk.go.id/> Accessed August 5th 2019, at 08.26 WIB.

will gradually shift various forms of manual transactions. One of them is an important element between sellers and buyers as well as between creditors and debtors, namely agreements. As it is known that the legal relationship between the two parties arises because of an agreement that directly takes place. But with fintech as an intermediary, the agreement becomes indirect (between the debtor and creditor) and issues arise regarding the validity of the agreement, as the basis of the legal relationship between the two parties.

DISCUSSION

Global Development of Fintech

The International Organization of Securities Commissions (IOSCO) in collaboration with the G20 and Financial Stability Board (FSB) around the world said that The term Financial Technologies or "Fintech" is used to describe a variety of innovative business models and emerging technologies that have the potential to transform the financial services industry¹⁰.

¹⁰ IOSCO is the international body that brings together the world's securities regulators and is recognized as the global standard setter for the securities sector. It is an International Organization as a regulator or regulator of securities throughout the world and a body that sets global standards for the securities sector, which then cooperates with the Committee on Emerging Risks (CER) which is an international committee in the field of risk management that provides guidance on management the risk for every country, even for every multinational company, to conduct a study of the evolution of fintech in the world. See:

Whereas basically, fintech is defined as the use of technology in financial industry services.

Globally, fintech has evolved in 3 periods, as can be seen in table 1¹¹. The first period occurred in the period 1866-1967, for the first time built financial infrastructure and technology that could facilitate financial services to be carried out, such as the construction of the Transatlantic Cable infrastructure, namely submarine communication cables. The period 1967-2008 is the second period referred to as the Fintech 2.0 era. Several financial innovations contained in this period were the Automatic Teller Machine (ATM), SWIFT, which was used to facilitate overseas transfers, cellular phones, and internet banking usage in line with the increasing internet penetration globally. In 2008 until now, according to Douglas W. Arner, this period is divided into two Fintech eras, namely 3.0 and 3.5. The increase in the use of financial services in this era increased very sharply due to an increase in the number of smartphone usage and there was a surge in start-up companies in the financial services

The sector is utilizing digital technology.

<https://www.iosco.org/> Accessed August 5th 2019, at 10.27 WIB.

¹¹ Departemen Perlindungan Konsumen Otoritas Jasa Keuangan, 2017, "*Kajian Perlindungan Konsumen Sektor Jasa Keuangan: Perlindungan Konsumen Pada Fintech*", Jakarta, Pg. 8.

Date	1866-1967	1967-2008	2008-Current	
Era	Fintech 1.0	Fintech 2.0	Fintech 3.0	Fintech 3.5
Geography	Global/ Developed	Global/ Developed	Developed	Emerging/ Developed
Key Elements	Infrastructure/ Computerization	Traditional/ Internet	Mobile/ startups/ New Entrants	
Shift Origin	Linkages	Digitalization	2008 financial crisis/ smartphone	Last mover advantage

Table 1: Period of Fintech Development

The monitoring body and policy recommendations provider regarding the global financial system, the Financial Stability Board (FSB) divides the types of fintech into four categories based on the type of innovation;¹²

a. Payment, clearing and settlement. This is fintech which provides payment system services, both those provided by the banking industry and those carried out by Bank Indonesia such as Bank Indonesia Real Time Gross Settlement (BI-RTGS), BI National Clearing System (SKNBI) to BI Scripless Securities Settlement System (BI-SSSS). Example, Kartuku, Doku;

- b. E-aggregator. This fintech collects and processes data that can be used by consumers to help decision making. This startup provides product comparisons of prices, features to benefits. Example, Cekaja, KreditGogo;
- c. Risk and Investment Management. This fintech provides services such as Robo advisor (software that provides financial planning services and e-trading and e-insurance platforms. Example, Bareksa, Cekpremi dan Rajapremi;
- d. Peer to peer lending (P2P). Fintech brings together lenders (investors) with loan seekers in one platform. Later investors will get interest from the funds lent. Example, Modalku, Investree.

The United States of America has a federal regulator that oversees the national banking system which then issues an initiative to start drafting a framework to regulate the rapid development of the fintech sector, namely The Comptroller of the Currency (OCC). Various types of US Federal regulations related to fintech, including banking laws, consumer protection, prohibition of unfair and deceptive practices, and anti-money laundering.¹³ The US fintech company must first comply with federal banking laws. Second, financial companies must meet

¹² See: <https://itgid.org/jenis-fintech/> accessed August 5th 2019, at 09.43 WIB.

¹³ Departemen Perlindungan Konsumen Otoritas Jasa Keuangan, *Op.cit.* Pg. 14

consumer-disclosure criteria such as, the Equal Credit Opportunity Act, the Truth in Lending Act, and others. Third, it must comply with provisions regarding the prohibition of unfair practices. Fourth, meet the anti money laundering or Anti Money Laundering / AML regulations.¹⁴

Whereas in the United Kingdom, it has the nickname into Fintech friendly', where the Financial Conduct Authority (FCA) launches an innovation hub that makes businesses, both regulated and who have not yet been able to introduce innovative financial products and services to the market. The FCA facilitates the entry of innovative foreign companies into the UK, and interprets the company's development efforts, so that the FCA can increase innovation competition and competition in the UK financial services market. In January 2017 it was discovered that the FCA carried out the first criminal action against fintech individual lenders who provided unlicensed credit loans, which were considered to violate the Consumer Credit Act 1974 and the Financial Services and Markets Act 2000, where the perpetrators operated as borrowers for people experiencing difficulties finance and targeting home guarantees in the hope that the borrower defaults on debt¹⁵.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

Development of Fintech in Indonesia

Based on the data, the types of fintech developed by start-up companies in Indonesia are quite diverse, according to a survey in the AFTECH Annual Member Survey Report showing that more than 70% of fintech start-up focus provides services to segments that are not served by banks (unbanked and underbanked).¹⁶ From these data, OJK has successfully mapped the fintech that developed in Indonesia along with the potential risks that arise in each type of fintech that exists.

In the type of digital payment, OJK said that the risk that arises is the security of consumer data, because with the existence of consumer information in the fintech company database, there are potential risks related to the privacy of consumer data and transaction data that can be misused by irresponsible parties. The next risk that can arise is, transaction errors. Where fintech digital payment requires a very strong information technology infrastructure management system so that it can support the entire transaction process properly, this infrastructure system includes software management, network and connectivity management, and security management.

¹⁶ See, <http://fintech.id/> Accessed August 5th 2019, at 11.29 WIB.

Fintech financial and investment companies usually provide crowdfunding and peer-to-peer lending (P2P Lending) services, with the risk of default due to a risk assessment error on credit borrowers, due to the terms and conditions for potential customers who want to use the service very easily and not too complex as in conventional banks and lending companies. The second risk is the lack of detailed information related to the parties, such as those who will provide loans (investors) are prone to the issue of money laundering. Whereas those who will borrow funds (consumers) are prone to the issue of applying the principle of knowing your customer (KYC).

Unlike the fintech account aggregator, which provides convenience by offering services that can accommodate all transactions from various banking accounts through one platform. This service can pose risks related to data security and misuse, because this type of fintech has access to the banking accounts of consumers or service users (users) indirectly. So there is the potential for fraud risk, if the company does not have a strong data security system and becomes vulnerable to banking crime.

The development of fintech in Indonesia requires the readiness of the government and regulators in regulating, especially those relating to business activities,

institutional aspects and risk mitigation. The Financial Services Authority (OJK), Bank Indonesia (BI) and related ministries need to continue to work together to support the millennial phenomenon that is happening in the financial sector. OJK itself in 2016 has responded to the phenomenon of fintech in the country, by issuing POJK No. 77 / POJK.01 / 2016 concerning Information Technology-Based Lending and Borrowing Services, also known as P2P Lending POJK, which then has a derivative regulation in the form of OJK Circular Letter (SEOJK) No. 18 / SEOJK.02 / 2017. This POJK regulates one type of fintech service that is increasingly widespread today, namely peer-to-peer lending (P2P Lending). Based on this regulation the parties involved in it, such as fintech service providers called Other Financial Services Institutions must be in the form of a limited liability corporation or PT and cooperatives.¹⁷ OJK also determines registration procedures that are carried out prior to the commencement of business activities, which are then followed by licensing procedures.¹⁸

Bank Indonesia responded to the development of this financial technology by issuing policies as a form of monitoring to

¹⁷ See, Article 2 Paragraph (2) POJK No.77 / POJK.01 / 2016 concerning Information Technology Based Lending and Borrowing Services (POJK P2P Lending)

¹⁸ See, Pasal 7 – 9 POJK P2P Lending

continue to support the creation of monetary stability, financial system stability, inclusive and sustainable national economic growth. Bank Indonesia as the payment system regulator has issued regulations related to fintech in Indonesia, through Bank Indonesia Regulation No.18/40/PBI/2016 concerning the Implementation of Payment Transaction Processing, then also published Bank Indonesia Regulation No. 19/12/PBI/2017 concerning the Implementation of Financial Technology (PBI Tekfin), and there is a Regulation of the Board of Governors No.19/14/PADG/2017 concerning the Regulatory Sandbox for Financial Technology, and finally the Regulation of the Members of the Board of Governors No.19/15/PADG/2017 concerning Registration, Submission of Information and Monitoring of Financial Technology Providers. In the Tekfin PBI the definition used by BI regarding fintech as the use of technology in the financial system has produced new products, services, technology and / or business models and can have an impact on monetary stability, financial system stability, and / or efficiency, smoothness, payment system security and reliability.¹⁹

¹⁹ Article 1 Peraturan Bank Indonesia No. 19/12/PBI/2017 tentang Penyelenggaraan Teknologi Finansial (PBI Tekfin)

BI also mentioned the category of financial technology implementation that consisted of²⁰:

1. Payment System,
2. Market Support,
3. Investment Management and Risk Management,
4. Loans, Financing and Capital Supply; and
5. Other Financial Services.

The fintech business is much influenced by the progress of online and e-commerce businesses. Millennials do a lot of activities using the internet, including shopping at online shops. This activity triggers the emergence of an electronic wallet application (e-wallet) that is easier and more practical when compared to a payment system with money, checks or bank transfers²¹.

Fintech services that are rife in Indonesia, the implementation of the transaction remains based on the agreement. The Civil Code (KUH Perdata) as a source of law in entering into agreements in Indonesia, in regulations related to fintech, is applied analytically, meaning that the provisions of fintech apply the provisions of Book II

²⁰ Article 3 ayat (1) PBI Tekfin

²¹ Citi Rahmati Serfiyani, Adinda Balqis Tegarmas G, Angela Widjaja Melani, 'Regulasi dan Perjanian Bisnis Tekfin Pinjaman', 2018, artikel yang digunakan untuk mengikuti *ALSA Indoensia Legal Review Competition* (AILRC) 2018. See, <https://kliklegal.com/regulasi-dan-perjanjian-bisnis-tekfin-pinjaman-ailrc/>

concerning the Law of Engagement and the Commercial Code (KUH Dagang)²². Article 1320 of the Civil Code (KUH Perdata) states the conditions for validity of the agreement, i.e:

1. Agreement of the Parties.

The agreement was born in the moment of reaching an agreement or agreement between the two parties regarding the main points of what was the object of the agreement. Mariam Darus Badruzaman described the notion of agreement as a condition of the agreed will (*overeenstemende wilsverklaring*) between the parties. The statement of the party offering is called the offer (*offerte*). And the statement of the party receiving the offer is called acceptatie²³. So there is an offer and acceptance is important for determining the birth of the agreement. In addition, agreements can be expressed or realized through a variety of ways, including verbally, in writing, with a sign or even with a symbol.

2. Ability to Make Agreements.

Ability in law contains two meanings, namely competent to do legal actions and have the power to make

agreements. Article 1330 of the Civil Code stipulates that every person is competent to make an agreement, unless the law stipulates that he is incompetent. In general, legal subjects deemed incapable of carrying out legal actions are children and people who are put under curatele like crazy²⁴. When entering into an agreement with the online fintech service, the parties are deemed competent if it is found to be different in the future, then it can be requested for cancellation from a judge by an incapable party including the guardian or his guide.²⁵

3. A Certain Matters.

This shows that in the agreement, there must be an object, where the object of the agreement is the same as the legal object. So the object must be determined, both the amount, size, location, type and price. In the fintech service itself, the object of the agreement can be in the form of money lending services if it is fintech with P2P Lending services, which then displays a thread containing information on terms and conditions for the use of the service.

²² Ery Agus Priyono, 2019, '*Berlindungan Hukum Terhadap Konsumen dalam Perjanjian E-Commerce*', Diponegoro Private Law Review Vol. 4 No.1 February (2019), Pg. 431.

²³ Badruzaman, Mariam Darus, 1994, *Aneka Hukum Bisnis*, Bandung, Pg. 24.

²⁴ In Article 1330 The Civil Code, women who are married are classified as incompetent in making agreements, but later the Supreme Court through Circular Number 3 of 1963 issued a call for this not to be enforced.

²⁵ Kuspriatni, Lista. 1998. *Hukum Perjanjian (Aspek Hukum dalam Ekonomi)*. Jakarta: Intermedia, Pg. 2

4. A Halal cause.

The fourth condition is the purpose of the parties to the agreement must be permitted by law. A reason that is prohibited if prohibited by law, is against morality or against public order. Even strengthened in Article 1335 of the Civil Code, which stipulates that an agreement without a cause, or that has been made for a false or forbidden reason, has no power. For fintech services, the purpose of the actual agreement is stated in the thread of terms and conditions when using the service.

Based on the discussion above, if the four legal conditions of the agreement are fulfilled in the fintech service, then an engagement has taken place resulting from the agreement between them. And resulting in a legal relationship that, is the emergence of rights and obligations for each party.

CLOSING

Basically an online agreement made in the use of fintech with a variety of services, is inseparable from the concept of the agreement provided for in Article 1320 of the Civil Code. The difference between conventional and online agreements lies only in the use of electronic media in the form of mobile phones, computers, or tablets as intermediaries between the two parties. Thus, as long as 4 conditions have been fulfilled in

Article 1320 of the Civil Code, the agreement is valid.

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