



Application of Article 40 of Law Number 10 Year 1998 Concerning Banking in Protecting Its Depositors and Deposits

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Abstract

This study aims to examine and analyse the implementation of article 40 of Law No.10 of 1998 concerning Banking in applying the principles of banking secrets. To conduct the study, a normative method and a legislative approach are used. From the results of the research it was revealed that the principle of banking secrets can be dismantled or opened to the public with a reason to investigate taxation and corruption, as well as in civil cases, and in the public interest.

Keywords: Customer; Banking Secrets

Introduction

The banking industry has such a large and dominant role in a country's financial system. In Indonesia the banking industry controls about 93% of the total assets of the financial industry, and the rest is controlled by the non-bank industry, such as insurance and finance companies (multi finance).¹ The magnitude of the role of the banking industry was triggered by the birth of Minister of Finance Decree No. 1062 / KMK.00 / 1988, October 27, 1988 Concerning the opening of the offices of Government Banks, Regional Development Banks, National Private Banks, and Cooperative Banks that are driving rapid increase in the number of banks.

According to Yunus Husen, the discussion on the issue of bank secrecy is very important, at least for four reasons, namely: first, it is not clear the limits of understanding bank secrecy; second, there is a tug of war between personal interests or privacy with the public interest (privacy versus public interest); three, banking law enforcement; and four, misuse of bank confidentiality provisions.² However, the problem is what is meant by bank secrecy, there are several issues that need an explanation related to

¹ Bank Indonesia, *Direktorat Penelitian dan Pengaturan Perbankan*, "Catatan Intern, (tidak diterbitkan, tahun 2002), p. 1. See: "Sang Pemimpin Besar Pasar Keuangan", *Infobank*, Vol. XXIII, No. 285, (August 2001), p.13-20.

² Yunus Husen, *Rahasia Bank Prevasi Versus Kepentingan Umum*, Universitas Indonesia Fakultas Hukum Pascasarjana, 2003, p.4.

bank secrecy, because the definition of bank secrecy is very broad and gives rise to multiple interpretations.

Does this mean that everything about the depositors and their funds must be kept confidential by the bank, for example the customer's name, address, account number, car number, hobbies, customer's family, and so on. Who are the depositors of funds that must be kept a secret. Whether all depositors of funds both individuals and legal entities must also be kept confidential.³

Considering that the obligation to keep a secret for the bank only covers the depositors, whether the customers are not depositors of funds (debtors and walk-in customers) are not required to be kept secret or left open and can be requested by anyone. Is the information about the customer not a depositor that is not required to be kept confidential under the law, but must be kept confidential according to the agreement between the bank and the customer.

Another question is whether bank secrets only cover bank customers who are still active or also include former bank customers. Regarding this matter, there is at least one indication that the former customer must also be kept confidential by the bank based on the provisions of Article 44 A paragraph (1) of Law no. 7 of 1992 concerning Banking as amended by Law No. 10 of 1998 which states that in the event that the depositing customer has died, a legal heir is entitled to obtain information regarding the depositing deposit.⁴ In this case the former customer still has a bank account. However, the obligation to keep this former customer a secret needs to be limited, for example only ten years in accordance with the length of the obligation to keep financial documents as stipulated in Act Number 8 of 1997 concerning Company Documents.⁵ Based on the description above it is clear that in general all of these problems have not been completely resolved or cannot be fully accommodated by the applicable laws and regulations.

From the background description described above, the discussion of issues that will be the focus of the discussion will be as follows:

1. Based on the description above it is clear that in general all of these problems have not been completely resolved or cannot be fully accommodated by the applicable laws and regulations.
2. From the background description described above, the discussion of issues that will be the focus of the discussion will be as follows:

Result and Discussion

1. Bank Secrets in Civil Cases between Banks and Non-Customer Third Parties Concerning Customer Deposits

As determined by Article 43 of Law No. 10 of 1998 that in a civil case between a bank and its customers, the Board of Directors of the bank concerned may inform the court of the relevant customer deposits relevant to the case. However, in practice, banks are often faced with conditions for which the bank is unclear whether to deal with such conditions, the bank may disclose the customer's financial condition. For example, in the first case that is in the case of a lawsuit in which a third party sues the

³ Ibid, p. 4.

⁴ Ibid

⁵ Law Number 08 of 1997 concerning Company Documents, Republic of Indonesia State Gazette of 1997 No. 18, Additional State Gazette No. 3674.

customer as Defendant I and the bank as Defendant II. The second case is a third party who is not a customer in dispute with the customer, has sued the customer. For collateral for his claim, a third party has submitted a request for confiscation to the court of the customer's deposits (current accounts, deposits or savings) at the bank. Upon the request, the court granted and through the confiscator, the court ordered the bank to block the customer's deposits as collateral.

The law stipulates that banks can disclose customer deposits if in the event of a dispute in a civil case with the customer. But in both cases, the bank does not face customers as opponents, but faces third parties who are not customers. The Banking Act does not regulate at all the attitudes that can be taken by banks if the bank is opposed to third parties who are not customers. In the first case, does the bank (Defendant II) have to ask permission from the leadership of Bank Indonesia if to defend against a third-party claim that is not a customer must be forced to disclose data about the customer's deposits (Defendant I).

If the bank is visited by a bailiff in the context of implementing the seizure of collateral as in the second case above, the bank is also not allowed by the Act to disclose the existence or absence of customer funds at the bank. If the request for confiscation of the guarantee is fulfilled by the bank by blocking the customer's deposits, the bank violates the bank's confidentiality provisions. In this case the path that can be taken by the customer is asking for customer approval. But as in the first case, the customer is not necessarily willing to give his approval.

The things that have been exemplified above are apparently not determined by Law No. 10 of 1998 as an excluded matter. Thus it becomes a question, whether in dealing with such situations the bank may disclose the identity of customers and deposits for the benefit of the bank if such things need to be done. Because it is not excluded as allowed, banks always face difficulties when faced with such conditions.

2. *Bank Secrets Against Judges in Criminal Cases*

Article 42 paragraph (1) and paragraph (2) of Law No. 10 of 1998 stipulates that for the benefit of the judiciary in criminal cases, the judge through the Chief Justice of the Supreme Court must obtain prior permission from the Chairman of Bank Indonesia to obtain information from the bank regarding the financial condition of the defendant who is a customer of the bank. According to Sutan Remy Sjahdeini, judges in carrying out their duties examine a case, not only a civil case but also a criminal case, it should not be necessary to obtain prior permission from the Chairman of Bank Indonesia as according to Article 42 of Law No. 10 of 1998. In other countries, exceptions are granted by the court for exceptions.

According to Sutan Remy Sjahdeini, the provisions of Article 42 of Law No. 10 of 1998 is contrary to the Elucidation of Article 24 and Article 25 of 1945. The explanation of Article 24 and Article 24 of the 1945 Constitution states:

Judicial power is an independent power, meaning that it is independent of government influence.

Regarding this independent judicial authority further determined and guaranteed by MPR Decree No. III / MPR / 1978 which states:

The Supreme Court is a body that carries out the judicial authority in carrying out its duties, regardless of the influence of governmental powers and other influences.

3. *Bank Secrets Against Bank Indonesia*

What is the case if Bank Indonesia, according to the provisions of Act No. 10 of 1998 was assigned to conduct coaching and supervision of banks, requiring details of the financial situation of certain customers of a bank. Is it because it is not explicitly stated that the Bank's confidential provisions do not apply to Bank Indonesia, then may the relevant bank not provide the information requested by Bank Indonesia? In other words, do Bank Indonesia provisions apply to bank secrecy? I am of the opinion that the Bank Indonesia regulation on bank secrecy does not apply even if it is not explicitly determined as such in the Banking Act.

Why is that? If Bank Indonesia is not included as an exempt party to be able to obtain information from the bank regarding the financial situation of the bank's customers, it is certain that Bank Indonesia may not conduct coaching and bank supervision as the function is stipulated by Article 29 paragraph (1) of the Act No. 7 of 1992 in conjunction with Law No. 10 of 1998. According to Article 30 paragraph (1): "Banks are required to submit to Bank Indonesia all information and explanations regarding their business according to the method determined by Bank Indonesia" Furthermore Article 30 paragraph (2) determines: "The Bank, at the request of Bank Indonesia, must provide an opportunity for examination of the books and documents available to it, and must provide the assistance needed in order to obtain the truth of all information, documents and explanations that are reported by the bank concerned."

The provisions of paragraph (1) and paragraph (2) of Article 30 should not be interpreted solely in grammatical terms, but must also be interpreted teleologically (according to their purpose). Considering that the purpose of the provisions of Article 30 is for Bank Indonesia to be able to carry out the functions of developing and supervising banks as they should, then of course all information and explanations as well as examinations of books and documents in banks must be freely accessible by the Bank Indonesia. From the explanation above, in my opinion, out of the seven exceptions to the enactment of the provisions of the bank's secret obligations which must be adhered to by each bank, that is the exceptions specified in Articles 41, 41A, 42, 43, 44 and 44A, there are exceptions which eighth, namely in the case of banks meeting the provisions of Article 30 of Law No. 7 of 1992 in conjunction with Law No. 10 of 1998, namely the submission of information concerning depositors and their deposits to Bank Indonesia.

4. *Bank Secrets Against the Supreme Audit Board*

As is known, the Supreme Audit Agency (BPK) is an external auditor of state-owned banks. If the BPK in the context of conducting audits on BUMN banks intends to carry out audits involving the customer's financial condition, does the SOE Bank concerned have to allow it without being considered as violating bank secrecy? In my opinion, the BPK is not authorized because the BPK is not the party to whom the bank's confidentiality provisions are excluded. This is due to the following reasons:

- a. In accordance with the provisions of Article 4 of Law No. 5 of 1973 concerning the Supreme Audit Board, that in carrying out its duties, the BPK is basically authorized to request information that must be given by every person, government agency / private agency, but as long as it is not contrary to the law.
- b. BPK's examination of a BUMN bank cannot be separated from the provisions of Article 40 of Law No. 10 of 1998 which stipulates that banks are prohibited from providing information about their Depositors and Deposits. Because the audit by the BPK of a State-Owned Bank may not be contrary to the law, as it is determined by Article 4 of Law No. 5 of 1973 concerning BPK, therefore it must

not also contradict Law No. 10 of 1998, the BPK is not authorized to examine customer files or to ask banks to submit information about their customers' deposits individually.

5. *Bank Confidential In the Event that the Customer Approval*

The formulation of bank secrecy as referred to in Article 40 paragraph (1) of Law No. 7 of 1992 (before being amended by Law No. 10 of 1998) and its exceptions have created uncertainty as to whether the customer's agreement can exclude bank confidentiality provisions. Considering the delict of bank secrecy in Law No. 7 of 1992 is not a complaint offense, then the approval of the relevant customer cannot free the bank from its obligation to keep it a secret. In other words, even if the customer has given his approval to the bank to be able to disclose the customer's financial condition, the bank is still considered to have violated bank secrecy and therefore is threatened with criminal sanction. The explanation below will be able to further clarify the problem.

In exceptions to the provisions of bank secrecy determined by Law No. 7 of 1992 (before being amended by Law No. 10 of 1998), it was not explicitly stated that bank secrecy does not apply if there is a customer's agreement to the bank to disclose it. In connection with that the question arises, whether even if there has been a customer agreement, the bank still can not be separated from the obligation to keep the financial situation of the customer who has given his approval? This question is one of the important legal issues concerning the secrecy provisions of Bank Indonesia based on Law No. 7 tahun 1992. This is not the case with bank secret provisions under British law and the laws of countries which stipulate bank secret provisions as civil or contractual obligations. In other words, according to the provisions of English law bank secrecy does not apply if the disclosure by the bank is approved by the customer.

As outlined by the decision of the Court of Appeal of the United Kingdom in the case of *Tournier v National Provincial and Union Bank of England* [1924] IKB 461, it was emphasized that customer approval is one form of exceptions to the enactment of bank secrecy provisions. According to the decision of the *Tournier* case, the bank's confidential obligations are excluded in the following matters:⁶

- a. If the disclosure is approved by the customer, both based on express or explicit approval (express or implied consent).
- b. If for the bank's sake, the disclosure needs to be done.
- c. If the disclosure is desired by law.
- d. If the disclosure is made by the bank in the context of carrying out its obligations to the public.

6. *Bank Secrets In the Case of Public Interest*

In connection with the exceptions stipulated in Law No. 10 of 1998 is limited in nature, so problems arise if in a particular case there is a public interest of very high priority requiring disclosure of data which according to the provisions of bank secrecy must be kept confidential by the bank concerned, then whether the provisions of bank secrecy must still be adhered to?

Regarding this, the bank's confidentiality provisions in the UK stipulate that banks may disclose such data if it is done by banks in the context of carrying out their obligations to the public.

⁶ Francis Neate & Roger McCormick, hal. 91; Dennis Campbell (General Ed.), p. 247.

According to Sutan Remy Sjahdeini⁷ agree with legal experts who believe that "public interest" is a "justification" for violating bank secrecy provisions by banks. I agree that "reasons in the public interest" eliminate the unlawful nature of the bank's secret criminal offenses.

In this regard, the question is: Can banks determine for themselves that in a particular case there is an element of "public interest"? According to Sutan Remy Sjahdeini, as with many legal experts the same opinion, that the presence or absence of "public interest" does not can be determined solely by the bank, but must be determined by the court casually.

Conclusion

Depositors and deposits are obliged to be protected because to maintain public trust in the bank, the obligation for banks to uphold bank secrecy is the implementation of the legal relationship between the bank and its customers based on the principle of confidentiality and also the legal relationship between the bank and its customers is based on an agreement relationship, Another reason why depositing customers must be protected with bank secrets is because there is a possibility that the bank will be sued by their customers because they are deemed to have committed acts of achievement.

The application of Article 40 of Law Number 10 Year 1998 concerning Bank Secrecy the application is not absolute, or in other words bank secrecy is applied using the theory of bank secrecy relative. This means that the application of bank secrecy can be kept if there are certain reasons that are used as justification to open bank secrecy. These reasons are in the interests of taxation, the occurrence of cases between the bank and the customer, in the interests of the criminal court and the approval of the customer with the approval of the heirs.

Recommendation

In regulating the legal protection of depositing customers and their savings through bank secrecy in the laws or legislation, it must be regulated in detail/regarding what is contained in bank secrecy, so as not to cause multiple interpretations in its application.

The banking law should regulate the Limits of public interest which are usually used as reasons for disclosing the secrets of its customers, or in other words it is necessary to add one (1) Article which regulates the criteria of public interest.

⁷ Sutan Remy Sjahdeini, *Loc. Cit.*

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