



Client Alert September 2022

FinTech: New Regulation on Peer-to-Peer Lending

Financial Services Authority Regulation of the Republic of Indonesia Number 10/POJK.05/2022 concerning Information Technology-Based Co-Financing Services ("POJK 10/2022")

Overview

The Financial Services Authority ("**OJK**") has issued the Financial Services Authority Regulation Number 10/POJK.05/2022 concerning Information Technology-Based Co-Financing Services (*Lembaga Pendanaan Bersama Berbasis Teknologi Informasi* – "**LPBBTI**") which takes place on July 4, 2022. This regulation governs Peer-to-Peer Financial Technology ("**P2P**") and replaces the previous regulation, namely the OJK Regulation Number 77/POJK.01/2016 of 2016 concerning Information Technology-Based Lending and Borrowing Services ("**POJK 77/2016**"). The new regulation is prompted by the rapid development of the information technology-based lending and borrowing service industry (*Layanan Pinjam Meminjam Uang Berbasis Teknologi Informasi* or "**LPMUBTI**") for the past six years which has required legal support.

POJK 10/2022 amends and clarifies matters that have been accommodated by POJK 77/2016, but also introduces significant changes. The changes introduced by this regulation are quite numerous, and for the purpose of this client alert, the discussion will be limited to new provisions which, in our perspective, have a significant impact on the P2P industry, including, among others, (i) licensing as a requirement for the commencement of LPBBTI (ii) sharia-based LPBBTI; (iii) certification and human resources; (iv) identification of controlling shareholder and its liability; (v) shift in risk management liability; and (vi) obligation to conform to the rules of the providers association.

Licensing as a Requirement for The Commencement of LPBBTI

Previously based on POJK 77/2016, LPBBTI Providers could conduct business activities after being registered to the OJK and within 1 (one) year since the registered date should apply for designated license to OJK¹. However, POJK 10/2022 revoked the said provision and further emphasizes that LPBBTI Providers may only carry out business activities after obtaining licenses. POJK 10/2022 has aligned with the provisions stipulated by Financial Services Authority Regulation of the Republic of Indonesia Number 6/POJK.07/2022 of 2022 concerning Consumer and Public Protection in the Financial Services Sector ("**POJK 6/2022**"), from which products and/or services offered by LPBBTI Providers as financial service providers, shall stipulate that the product and/or service is licensed and supervised by the OJK.

Furthermore, in order to provide P2P facilities, LPBBTI Providers shall be registered as Electronic System Providers (*Penyelenggara Sistem Elektronik - "PSE"*) at the Ministry of Communication and Information Technology ("**MoCIT**") after obtaining license from OJK². Providers are required to apply for registration at the latest 30 (thirty) days after obtaining a business license from the OJK. POJK 10/2022 also obliges the LPBBTI Providers to be registered within 60 (sixty) days after obtaining a license from the OJK, otherwise, OJK could revoke the approved license already given³.

It is noteworthy as well that there is a significant alteration in the provision of paid-in capital, previously newly established P2P companies only had to have a paid-up capital of Rp. 2,500,000,000 (two billion and five hundred million Rupiah)⁴ and under POJK 10/2022 the paid-up capital for a newly established P2P company shall have a paid-up capital of Rp. 25,000,000,000 (twenty-five billion Rupiah)⁵. The background of this new provision is to restrain the growth number and improve the quality of P2P companies established in Indonesia.

LPBBTI Providers based on Sharia Principles.

POJK 10/2022 provides a specific provision for converting conventional to Sharia principles LPBBTI Providers⁶. Basically, there is no difference in the provisions regarding the amount of paid-up capital, controlling shareholders, or other technical related matters between conventional LPBBTI Providers and Sharia-Based Providers. The main difference is more focused on the implementation compliance of LPBBTI Providers with the Sharia principles, among others by way of appointing and establishing a Sharia Supervisory Board, the ratification of which is carried out by the National Sharia Council (*Majelis Ulama Indonesia* or "**MUI**")⁷.

Conversion could be implemented if it has obtained a prior approval from the OJK, under which OJK would conform the minimum equity requirements for LPBBTI and the objective of conversion which would not harm the users⁸. The providers are also required to first announce the plan and impact of such conversion to users through an electronic system (via the website and/or mobile application). Furthermore, at least, half of the members of the Board of Directors of a Sharia-compliant providers should have at least 1 (one) year of operational experience in a financial institution that conducts business activities based on Sharia principles⁹.

Identification of Controlling Shareholder and Its Liability

Controlling Shareholders have been mentioned in POJK 77/2016, however, there is no further elaboration regarding its criteria. Now, POJK 10/2022 sets out Controlling Shareholders (*Pemegang Saham Pengendali - "PSP"*) criteria and provide further requirement where LPBBTI Providers shall have at least 1 (one) PSP that fulfill the qualifications and should be reported to the OJK¹⁰.

¹ Article 10 (1) POJK 77/2016

² Article 8 (2) POJK 10/2022

³ Article 8 (7) POJK 10/2022

⁴ Article 4 POJK 77/2019

⁵ Article 4 POJK 10/2022 in connection with Article 113 POJK 10/2022

⁶ Chapter II Sub-Section IV POJK 10/2022

⁷ Article 57 POJK 10/2022

⁸ Article 10 (2) POJK 10/2022

⁹ Article 55 (3) POJK 10/2022

¹⁰ Article 5 POJK 10/2022

To be categorized as a PSP, it should comply with the following requirements¹¹:

- i) Type of Subject:
 - a. legal entities;
 - b. individuals; and/or
 - c. business groups.
- ii) Having 25% (twenty-five percent) or more shares of the providers of the issued amount with voting rights; or if the shares owned are less than 25% (twenty-five percent), at least it must have voting rights and proven to have exercised control over the provider either directly or indirectly.

OJK will then conduct a fit and proper test of the prospective PSP. It is noteworthy as well that no party can become a PSP for more than 1 (one) provider, both conventional LPBBTI providers and those with Sharia principles, except the Government of Republic Indonesia itself¹².

PSP identification is required to determine liability in the event of a loss to the providers caused by controlling actions. PSP is liable for losses suffered by the provider in the event of¹³:

- i) PSP, either directly or indirectly, in bad faith, utilizes the provider for the PSP's interest;
- ii) PSP is involved in unlawful acts committed by the provider; or
- iii) PSP, either directly or indirectly, unlawfully utilizes the assets of the provider, which causes the assets of the provider to be insufficient to meet its financial obligations.

Such concept is similar to the principle of Piercing the Corporate Veil in the Limited Liability Company Law. Furthermore, the regulation provides that to hold the PSP liable, it can be determined by¹⁴:

- i) resolutions of the GMS for the provider which is a public company;
- ii) Court decisions that have permanent legal force; or
- iii) Decision of the OJK for losses arising from PSP, either directly or indirectly in bad faith, using the provider for the benefit of the PSP.

Certification and Human Resources

Arrangements regarding human resources and experts within the provider are now tightened and improved. POJK 10/2022 increases the minimum number of Board of Directors to two. Then, members of the Board of Directors, members of the Board of Commissioners, and officials 1 (one) level below the Board of Directors are required to have a work competency certificate from a professional certification agency in the field of financial technology registered with the OJK. All members of the Board of Directors shall be domiciled in Indonesia, while at least half of the members of the Board of Commissioners must be domiciled in Indonesia¹⁵.

Regarding experts in the field of technology and information within the provider's company, POJK 10/2022 postulates clearly the expertise that must be possessed by experts, namely developing, altering, and deleting Electronic Systems used by provider¹⁶.

In addition, POJK 10/2022 also increases the minimum number of years of experience. For Directors, at least half of the total members of the Board of Directors have at least two years of experience in credit or financing, risk management, and/or finance. For the Board of Commissioners, at least half of the total members of the Board of Commissioners, have two years of work experience at the managerial level in financial services institutions. For experts in the field of technology and information, three years and expertise in the field of Information Technology includes skills in the fields of databases, networks, electronic system security, and programming.

Currently, POJK 10/2022 also regulates the use of foreign workers in P2P companies, which was not previously regulated in POJK 77/2016. P2P company could use foreign workers under the following criteria¹⁷:

¹¹ Article 1 (29) POJK 10/2022

¹² Article 6 POJK 10/2022

¹³ Article 7 (1) POJK 10/2022

¹⁴ Article 7 (2) POJK 10/2022

¹⁵ Article 55 and Article 56 POJK 10/2022

¹⁶ Article 17 POJK 10/2022

¹⁷ Article 18 POJK 18/2022

- i) The maximum term of foreign workers engagement may not exceed the period of 3 (three) years for each foreign worker in one time position and could not be extended;
- ii) prohibited from being employed other than in the field of Information Technology as expert with one level below the Board of Directors or as consultant;
- iii) have expertise in accordance with the field of work which will become his/her responsibility; and
- iv) complied with the employment laws and regulations.

The P2P companies that use foreign workers are mandatory to provide:

- i) organize activity over knowledge from foreign workers to employees of LPBBTI Providers; and
- ii) appoint at least 1 (one) Indonesian worker as a companion for 1 (one) person foreign worker.

Furthermore, the P2P companies are required to report the implementation of education and training programs by writing to OJK no later than 1 (one) month after the calendar year ends every year.

Shift in Risk Management Liability

Actually, regulation related to risk management has been regulated under POJK 77/2016. The regulation states that the providers and users shall mitigate risk in order to prevent any default¹⁸. However, the regulation does not provide action which must be taken by the providers or users to mitigate the risk. A quite significant change is introduced by POJK 10/2022 where the burden of risk mitigation solely becomes the obligation of the providers.

Furthermore, POJK 10/2022 regulates kind of actions that should and could be taken by the providers to mitigate risk, namely implementing risk management, at least, consisting of¹⁹:

- i) active supervision of the Board of Directors, Board of Commissioners, and Sharia Supervisory Board;
- ii) the adequacy of risk management policies and procedures as well as the determination of risk limits;
- iii) adequacy of risk identification, measurement, control and monitoring processes, as well as risk management information systems; and
- iv) comprehensive internal control system.

In addition to risk management, the providers are required to facilitate risk mitigation to, at a minimum, consist of:

- i) perform a lending risk analysis proposed by the lender;
- ii) verify user identity and document authenticity;
- iii) collect the optimally distributed funding;
- iv) facilitate the transfer of lending risk; and
- v) facilitate the transfer of risk on the object of the guarantee, if there is an object of the guarantee.

One of the powers that the providers may exercise is to exchange information (obtaining and transferring) of users or prospective users. Information that can be obtained is related to personal data, transaction data, and financial data. The providers shall guarantee that the data obtained by the providers are based on the consent provided by the data owner. In case there are any breaches of data protection, such providers shall notify the data owner regarding the event²⁰.

Moreover, OJK currently stipulates internal audit provisions, with the following provisions²¹:

- i) P2P companies are required to have internal audit units which run by at least 1 (one) human resource who has the expertise and/or background in the field of audits;
- ii) The internal audit unit is responsible directly to the President Director. P2P company required to conduct internal audit at least 1 (one) time every year; and
- iii) P2P companies may appoint other parties to conduct internal audit activities.

¹⁸ Chapter V POJK 77/2016

¹⁹ Article 35 POJK 10/2022

²⁰ Article 44 POJK 10/2022

²¹ Article 58 POJK 10/2022

Obligation to Conform to the Rules of the Providers Association

Align with previous regulation, the providers should become a member of the LPBBTI Providers Association. The association referred to here is an association officially appointed by OJK, among others AFPI (*Asosiasi Pendanaan Bersama Indonesia*), AFSI (*Asosiasi Fintech Syariah Indonesia*), and AFTECH (*Asosiasi Fintech Indonesia*). Beyond the obligation to be registered as a member of LPBBTI Providers Association, the new regulation has also required the providers to comply with the rules of the LPBBTI Providers Association²².

This arrangement drives the P2P companies to comply with the applicable norms, among others as established by the association. Violation of the registration obligation will be subject to administrative sanctions which can take the form of²³:

- i) written warning;
- ii) limitation of business activities; and/or
- iii) license revocation.

However, it should be noted that this regulation does not impose sanctions on providers that could not comply with the rules of the LPBBTI Providers Association.

Key Takeaways

In addition to the update and new provisions described above, POJK 10/2022 also regulates the following aspects:

- i) LPBBTI Providers could facilitate the factoring (*anjak piutang*) under the following criteria:
 - a) Receivables for productive funding (e.g. invoice financing, procurement of goods ordered (purchase order), procurement of goods for sale online (online seller), working capital, or project funding); and
 - b) Guarantee availability from the seller of receivables.
- ii) Aside from having a Maximum Limit of Financing (*Batas Maksimum Pendanaan*), LPBBTI Providers should comply with the Maximum Limit of Economic Benefits (*Batas Maksimum Manfaat Ekonomi Pendanaan*) which are related to the rate of return (e.g., yields including interest, profit sharing, *ujrah* or margin).
- iii) LPBBTI Providers could implement Sharia principles in P2P activities. It is noteworthy as well to pay attention to the applicable Islamic Law framework in Indonesia, comply with the new mandatory requirement, along to separate the conventional and shariah-based activities according to transitional provision on POJK 10/2022.
- iv) Limitation of direct and indirect foreign ownership over LPBBTI Providers for a maximum of 85% (eighty-five percent), except providers that already have operational licenses before of enactment of POJK 10/2022.
- v) Restriction for LPBBTI Providers for having equity capital from debt/loan as well as the originating source of the fund could not from money laundering, terrorism, financing the proliferation of weapons of mass destruction, and other financial crimes.
- vi) Increased protection of consumer and data protection (personal and transactions) at LPBBTI which is aligned with POJK 6/2022 regulation note that the Personal Data Protection Bill was ratified by the House of Representatives on 20 September 2022 and is expected to enter into force upon its promulgation. Therefore, the use of data by LPBBTI shall also be subject to the Law on Personal Data Protection.
- vii) Revocation of POJK 77/2016 based on the closing provision of POJK 10/2022 does not terminate existing implementing regulations of POJK 77/2016 (i.e. OJK Circular Letter Number 18/SEOJK.02/2017 TAHUN 2017 regarding Governance and Risk Management of Information Technology in Information Technology-Based Lending and Borrowing Services).

Potential Issues Surrounding

- Several provisions, among others related to (i) Escrow Account, Virtual Account, Fund Account, and other Fund Transfer Media; (ii) Provider's Funding Quality Rate; and (iii) Debts Collection will be further regulated by OJK regulations which have not yet been issued. This creates uncertainty prior to the issuance of such regulations.
- Obligation to maintain and gradually increase the equity of the Providers. This may be a challenge for the existing Providers since POJK 77/2016 only stipulates that the Providers shall make a paid-up capital of Rp. 2,500,000,000

²² Article 108 POJK 10/2022

²³ Article 109 POJK 10/2022

(two billion five hundred million Rupiah). Pursuant to POJK 10/2022 within 3 (three) years from the enactment of POJK 10/2022, the Providers are required to maintain and increase their equity periodically to Rp. 2,500,000,000 (two billion and five hundred million Rupiah) for the first year, Rp. 7,500,000,000 (seven billion and five hundred million Rupiah) for the second year, and Rp. 12,500,000,000 (twelve billion and five hundred million Rupiah) for the third year.

- Specifically for Providers that currently operate both services on a conventional and Syariah basis shall stop the marketing of their products and require to separate the service on a Syariah basis from their current services. Therefore, conventional and sharia should operate on a separate and independent basis.
- Any Director of the Provider who currently holds concurrent position as Directors in the other companies, such Directors are allowed a maximum period of 6 (six) months since the enactment of POJK 10/2022 to terminate their positions in the said companies. Any PSP that has become a PSP in more than 1 (one) Conventional Providers and 1 (one) Sharia Providers is granted a maximum period of 1 (one) year from the enactment of POJK 10/2022 to release its shares ownership or role as a PSP in another company, so that the PSP only becomes PSP for maximum 1 (one) Conventional Provider and 1 (one) Sharia Provider.

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