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Legal Protection for Government Banks on the Implementation of Write-Off

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ABSTRACT

Write-off is a way to improve credit system of bank by moving a problematic loan that difficult to handle from bank's balance sheet become extracomptable therefore it will not burden the bank's performance later, however it does not remove the bank's right to collect as an effort to pay off problematic loans to the debtor. At a macro level, this research has a goal to improve the financial performance of banks by write off system. The specific objective is to provide legal protection for banks that carry out a write-off system and rescue problematic loans (credit) by write-off system. Statute Approach (Statute Approach) was done by reviewing every laws and regulations related to the write-off system of problematic loans in governmental banks. Conceptual Approach was done in order to maintain researcher to stay by the existing legal rules. While write-off mechanism is one of the efforts to save problematic loans that commonly used by banks. To decide whether problematic credit is included in the criminal law and corruption or not, it should be necessary to observe the process. Based on the description it can be concluded that as long as credit decisions that end up problematic are made based on business judgment, decided without a conflict of interest, and are accountable, it should not be criminally wrong.

Keywords: *Improve Credit, Problematic Credit, Write-Off*

INTRODUCTION

Write-off is a way to improve credit system of bank by moving non-performing loans (problematic) that difficult to handle from bank's balance sheet to being extracomptable therefore it will not burden the bank's performance later, however, it does not remove the bank's right to collect the loan as an effort to pay problematic loans to the debtor.

The write-off mechanism is basically a last resort that usually chosen by banking institutions if several other credit rescue efforts such as intensive billing, reconditioning, rescheduling, restructuring and selling collateral do not provide maximum results, or the debtor runs away, disappears, and cannot be contacted.

The write-off mechanism is generally an unusual step for shareholders because it can reduce bank profits and dividends for shareholders, and reflects the bank's management that is not careful in managing its credit portfolio.

Write-offs are an official mechanism that has a legal basis, which can be carried out by banking institutions in dealing with their non-performing loan portfolios, where the funds used for write-offs have actually been prepared with a system for establishing reserves for productive asset write-offs in accordance with Bank Indonesia Regulations. However, for BUMN and BUMD banking institutions, the issue of write-offs still raises doubts, when it is associated with the terminology of "state wealth/state finance" as regulated in Law no. 17/2003 concerning on State Finance which defines state finances to include: State assets/regional assets managed by themselves or by other parties in the form of money, securities, receivables, goods, and other rights that can be valued in money, including assets separated from companies country/regional company.¹

Although credit write-off is not a violation of the provisions, banking institutions must be careful in doing so. One of the most important things in the credit write-off policy is the fulfillment of the minimum requirements and knowing the causes of bad loans that must be written off.

In banking world, it is known that there are cumulative conditions for writing off credit, the credit should be in problematic category, the age of credit congestion is sorted by the oldest order (aging), in this case the debtor has no prospect of being restructured, and the collateral controlled by the bank cannot be covered. credit. The cause of problematic credit needs to be the attention of the bank, because if the write-off is not carried out carefully, it can become a moral hazard for bank employees to collude with debtors in order to avoid payment of obligations.

In credit known what is called business risk and non-business risk. If bad loans are caused by business risks, such as natural disasters, economic crises, debtor management problems and so on, then writing off bad loans like this does not

¹ Sudjana Sudjana, "Kebijakan Kredit Yang Dihapusbukukan Atau Dihapus Tagih Oleh Bank BUMN Dalam Perspektif Kepastian Hukum," *Jurnal Ilmiah Kebijakan Hukum* 12, no. 3 (2018): 331, <http://ejournal.balitbangham.go.id/index.php/kebijakan/article/view/509>.

require further investigation. Meanwhile, if bad loans are due to non-business risks (due to the discovery of improper credit processes, fraud by debtors, or indications of collusion between bank employees and debtors), the write-off of bad loans with these criteria requires an in-depth investigation.

Taking steps to write-off to improve the company's performance, so far it has not caused serious legal problems, but the BPK RI in this case has warned that the write-offs carried out by several state-owned banks do not have an adequate legal basis, because of Perpu Number.19/1960 concerning on PUPN and Constitution No. 17/2003 has not been amended.

Basically, the purpose of a bank writing off credit is in order to improve financial performance. If a loan is written off, the profitability of the bank is not affected, because profitability has been calculated when the bank recorded a credit risk reserve. The write-off of credit will only reduce the reserves that have been provided, but will not affect the profit and loss figure.

The benefits that will be obtained by the bank by writing off credit that have been bad, then the number of non-performing loans (NPL) of the bank will directly decrease. A low NPL number will clearly improve the soundness of the bank, because it is considered to have a lower risk of bad loans.

In addition, the rate of return on assets (ROA) of the bank will also improve, because the value of the divisor in ROA is decreasing while the value of the numerator (return) is constant. This ROA will continue to improve, especially when written-off loans have resulted in a high recovery rate. The results from the recovery of written-off loans will become other operating income which will clearly help raise the ROA figure.

Thus, redemption is a last resort that can be done by a bank in rescuing non-performing loans. At a macro level, this research has a goal in order to improve the financial performance of banks with a write off system. The specific objective is to provide legal protection for banks that carry out a write-off system and to rescue non-performing loans (bad credit) with a write-off system.

RESEARCH METHODOLOGY

This research method contains several things that will be described, namely the type of legal research carried out is normative research by considering the starting point of legal research on laws and regulations related to saving non-performing loans with a write-off system at government banking institutions in Indonesia. The statute approach is carried out by reviewing all laws and regulations related to the write off of non-performing loans at state banks. Conceptual Approach (Conceptual Approach) which is carried out when the researcher does not move from the existing legal rules. This is done because there is no legal regulation for the problem at hand.² by this conceptual approach, this is carried out

² Peter Mahmud Marzuki, *Penelitian Hukum*, 13th ed. (Jakarta: Kencana, 2017).

as an effort to refine this in-depth legal research regarding the write-off mechanism for state banks in an effort to improve their financial performance on non-performing loans whose regulation still raises doubts about what is meant by "state finances", thus it cause an uncertainty of legal regulation.

RESULTS AND DISCUSSION

As described earlier, the main problem in this research focuses on what is meant by legal protection for state banks in carrying out write-offs on non-performing loans.

Bad (Problematic) Credit

The definition of non-performing loans is the granting of a credit facility containing the risk of congestion. As a result, credit cannot be collected, resulting in losses. No matter how good a credit analysis is in considering a credit application, the possibility of non-performing loans will still exist.

Non-performing loans are loans where the debtor does not meet the requirements that have been previously agreed upon, for example requirements regarding interest payments, taking loan principal, increasing margin deposits, binding and increasing collateral.³

A credit can be said to be problematic if the debtor defaults or breaks his promise or does not settle his obligations in accordance with the sound in the agreement both in amount and time, for example payments for calculating interest and principal debt. A credit is said to be bad since it is not fulfilled the conditions stated in the credit agreement, if the debtor does not pay the installments and interest for three times in a row.⁴

The signs are written as following below:

1. Before the payment deadline, the account does not show debit and credit mutations.
2. Credit is continuously over drafted.
3. There are signs that the debtor is no longer able to pay interest on the credit provided by the creditor.

A credit is said to be problematic with the classification, among others, classified as substandard credit, doubtful credit, and non-performing credit. The term non-performing loans has been used by Indonesian banks as a translation of Problem Loan which is a term that is commonly used in the international world.⁵

³ A Mahmoeddin, *Melacak Kredit Bermasalah* (Pustaka Sinar Harapan, 2002), <https://books.google.co.id/books?id=5aOCAAACAAJ>.

⁴ Bank Indonesia Indonesia, "Peraturan Bank Indonesia Nomor 2/15/PBI/2000 Tahun 2000 Tentang Perubahan Surat Keputusan Direksi Bank Indonesia Nomor 31/150/KEP/DIR Tanggal 12 November 1998 Tentang Restrukturisasi Kredit" (2000), <https://peraturan.bpk.go.id/Details/137875/peraturan-bi-no-215pbi2000>.

⁵ Mahmoeddin, *Melacak Kredit Bermasalah*.

In order to be able to determine whether a credit is said to be non-performing, it must be based on the collectability of the credit. Collectability is the condition of payment of principal or installments and credit interest by the debtor and the level of possibility of receiving the funds back.⁶

A credit will be said to be problematic if it characterized by the following characteristics below:

1. Does not meet the criteria for current, substandard and doubtful.
2. Meets the criteria for doubt, but within 21 months of being classified as doubtful there has been no repayment or credit rescue effort.

The settlement of the credit has been submitted to the district court or state debt agency or compensation has been submitted to the credit insurance company.

All legal subjects, whether human or legal entities, can make an agreement that creates an agreement between the parties that binds the parties to the agreement as regulated in Article 1338 of the Civil Code.

In the agreement there are always two subjects, namely the party who is obliged to perform an achievement and the party entitled to an achievement. In fulfilling an achievement on an agreement that has been made by the parties, it is not uncommon for the debtor (customer) to be negligent in carrying out its obligations or not to carry out an achievement, this is what is called as a breach of contract (*wanprestasi*).

The word "*wanprestasi*" comes from Dutch which means: "bad performance" and when compared to the word *Wanbeheer* which means bad management, so does the word "*Wanddad*", which means bad deeds.⁷

Wanprestasi is the absence of an achievement in contract law, in this case what is meant is something that must be carried out as the contents of an agreement. In Indonesian, the term "implementation of the agreement for performance is commonly used and the absence of implementation of the promise for default".

Subekti stated that "default" is negligence or negligence which can take the form of four kinds, namely:

1. Not doing what he was promised to do
2. Carry out what has been promised, but not as promised
3. Doing what was promised but too late
4. Doing something that according to the agreement cannot be done.

If the debtor "because of his fault" does not carry out what was agreed upon, then the debtor is in default or is in breach of contract. The word because of his

⁶ R Usman, *Aspek-Aspek Hukum Perbankan Di Indonesia* (Gramedia Pustaka Utama, 2001), <https://books.google.co.id/books?id=NnmhG-EVHFAC>.

⁷ Subekti Jurist., *Hukum Perjanjian* (Jakarta: Intermasa, 2002).

fault is very important, because the debtor does not carry out the promised achievement at all not because of his fault.⁸

Based on the description above, it can be seen the meaning of wanprestasi, a person can be said to be in default when he "does not provide achievements at all, late in providing achievements, performs achievements not according to the provisions of an agreement".⁹

Non-performing loans can be caused by several factors, namely the presence of internal and external factors.

Internal factors that may cause non-performing loans are:

1. Expansive pre-credit policy
2. Deviations in the implementation of credit procedures
3. Bad faith from the owner, manager or creditor employee
4. Weak credit administration and supervision systems and weak non-performing credit information systems.

Meanwhile, the external factors that may cause non-performing loans are:

1. Debtor's business failure;
2. Disaster to the debtor or to the debtor's business activities;
3. Utilization of unhealthy banking competition climate by debtors;
4. Declining economic activity and high lending rates.

Write Off

Definition and scope of elimination of bad credit in banking practice, in the early stages, banking institutions will make efforts to save credit for credit portfolios that are classified as non-performing loans (substandard loans, doubtful loans, bad loans). Efforts to save credit are carried out by the bank using three sequential methods, such as:

1. Rescheduling;
2. Requirements return (reconditioning);
3. Restructuring (restructuring or restrncturization).

If the efforts to save credit by restructuring remain unsuccessful and the credit portfolio remains bad, then you can take the elimination of bad credit. Elimination of bad credit (write-off) is a common practice for national banking institutions as a way to reduce the non-performing loan ratio (NPL ratio) in order to improve the soundness of banks.

Even though write-offs have been carried out and collections written off, it is still possible to collect bad credit portfolios so that they can provide cash income to the bank. This kind of income must still be entered into the bank's books, namely

⁸ R. Subekti, "Syarat Subyektif Menyangkut Para Pihak Dalam Perjanjian Tersebut Sedangkan Syarat Subyektif Menyangkut Obyek Dari Perjanjian Itu Sendiri 2001), 17," in *Hukum Perjanjian* (Jakarta: PT. Intermasa, 2001), 17.

⁹ Landasan Teori, "Pengertian Kredit Bermasalah," Landasan Teori, 2016, <http://www.landasanteori.com/2015/10/pengertian-kredit-bermasalah-definisi.html>.

in the post of other income, so that it cannot be used as personal income for bank officials.

According to Dahlan M. Sitalaksana, write-off is defined as write-off. In the context of banking, this term is usually intended to remove unproductive asset accounts and bookkeeping, such as bad loans that cannot be collected, however, banks still have the right to collect bad loans as much as possible.¹⁰

The write-off of bad credit by a bank can basically be done by the bank as long as the bank concerned is able to carry it out, that is, it has sufficient reserves.

In the event that the reserves formed by the bank are not sufficient, the write-off of the bad credit can be charged to profit or loss after tax. In its implementation, credit write-offs are carried out voluntarily or mandatory (mandatory write-offs). The main purpose of writing off bad loans is primarily to improve the condition of the quality of the productive assets of banks. However, in practice it is still considered that there are various problems, particularly regarding tax provisions, bank secrecy provisions and various problems faced by many banking institutions, especially banks that have gone public.

Credit write-off carried out by banks can be divided into two:

1. Administrative write-off that does not eliminate the right to collect. Credits written off are still recorded on an extra compatible basis. The debtor was not notified because the debtor's status as a borrower had not been written off. and,
2. Write-off which is considered a loss and is no longer billed. In this case the bank actually bears the loss and the amount of credit to be written off will actually be removed from the balance sheet (both on balance and off-balance sheet). This is especially true for debtors who have been declared bankrupt.

Credit write-off consists of two ways and two stages, such as:

1. Conditional write-off; and
2. Absolute write-off.

Write-offs are generally only carried out by the bank if the bad credit portfolio is already very difficult to collect or because the collection fee is very large.

In the first stage, the bank will write off the books by removing all bad debt portfolios from the bank's books, but the bank will still make efforts to collect debts from debtors. If the write-off program still does not succeed in returning the credit money, then the bank can create a write-off program so that the bank does not need to make collection efforts to the debtor. litigation (court) and non- litigation (out of court) pathways.

¹⁰ Sulaksana Dahlan M., "Penghapusbukuan Kredit Macet, Kerahasiaan Bank Dan Implikasi Perpajakannya," in *Write Off Kredit Macet*, 1997, 57.

Write Off Legal Regulation

Write-off programs for bad loans must be implemented in accordance with the applicable laws and regulations so as not to cause conflicts of interest and abuse of authority that can harm banking institutions and debtor customers. write-off programs for bad credit in commercial banks, both private and state-owned banks, are generally regulated in Bank Indonesia Regulations (PBI), particularly in Chapter VII, Articles 69 to 71 and PBI No. 7 of 2005 concerning the assessment of the asset quality of commercial banks. In addition, the write-off and write-off programs in accordance with the mandate of Article 8 Paragraph (2) of the Banking Law (UU 10 of 1998) must also be regulated in credit guidelines that must exist in each bank.

The write-off and write-off programs must first be approved by the General Meeting of Shareholders (GMS) as the highest authority in a Limited Liability Company as regulated in Law 40 of 2007 concerning Limited Liability Companies. The implementation of write-offs and write-offs must always be based on the results of the GMS decisions according to the corporate mechanism. The bank's board of directors initially proposed a number of bad loan portfolios to be written off and/or written off to the GMS for approval. The GMS mechanism is regulated in Law 40 of 2007 concerning Limited Liability Companies Chapter VI Article 75 to Article 91. The majority shareholder will determine the outcome of the GMS decision. Especially for state-owned banks, the results of the GMS decisions are highly influenced by the government's policy as the majority shareholder in state-owned banks.¹¹

Term and Regulation of Write Off Programs

In accordance with Bank Indonesia Regulation No.7/2/PBI/2005 concerning Asset Quality Assessment for Commercial Banks and their amendments.

1. Article 69
 - a. Banks are required to have written policies and procedures regarding write-offs and write-offs.
 - b. The policy as referred to in paragraph (1) must be approved by the Commissioner.
 - c. The procedure as referred to in paragraph (1) must be approved at least by the Board of Directors.
 - d. The Commissioner is required to actively supervise the implementation of the policy as referred to in paragraph (1).
 - e. The policies and procedures as referred to in paragraph (1) are an integral part of the Bank's risk management policies as stipulated in the applicable Bank Indonesia regulations.
2. Article 70
 - a. Write-offs and/or write-offs can only be made for the provision of funds that have the quality of Loss.

- b. Write off cannot be done on part of the provision of funds (partial write off).
 - c. Write-off can be done either for part or all of the provision of funds.
 - d. The write-off of a portion of the provision of funds as referred to in paragraph (3) can only be made in the context of Credit Restructuring or in the context of Credit settlement.
3. Article 71
- a. Write-off and/or write-offs as referred to in Article 70 may only be performed after the Bank has made various efforts to recover the Earning Assets provided.
 - b. Banks are required to document the efforts made as referred to in paragraph (1) as well as the basis for consideration of the implementation of write-offs and/or collections.
 - c. Banks are required to administer data and information regarding Earning Assets that have been written-off and/or written off.

Related to the Company's Guidebook for Credit Sector Book II Chapter VI concerning Credit Rescue Procedures:

1. Write-Off Policy

Write-off of accounts receivable is an administrative action taken by the Bank on uncollectible/uncollectible bank receivables.

This write-off of accounts receivable does not result in the elimination of the Bank's right to collect the debtor. So that at any time the Bank can collect the written-off receivables, if the receivables are eligible for collection and have not expired according to the Act, namely article 1967 of the Civil Code. The Credit Analyst is responsible for submitting a write-off proposal to the authorized official, for Bank credits/receivables that have met the criteria for a write-off.

2. Write-Off Criteria

A bank receivable or debtor's liability can be proposed for write-off if the collectability is already in category 5 (loss) and meets the following criteria:

- a. Debtor's business is stuck.
- b. The debtor has died and there are no third party heirs who can complete the credit.
- c. The address of the debtor is unknown/run away and no family is responsible for completing the credit.
- d. The owner of the collateral/guarantor is unable/unwilling to assist with the proposed settlement steps.
- e. Collateral goods are destroyed/impaired in value or their value has changed.
- f. The debtor is declared bankrupt by the District Court.

- g. The debtor's liability balance has been recorded by KP2LN as state receivables which are temporarily uncollected.
- h. Internal collection efforts have been carried out optimally.
- i. There are no sources of return from debtors and other parties.
- j. Bad debts whose claims for compensation have been paid/rejected by the guarantor institution.

3. Write-Off Procedure

The write-off procedure that must be carried out is to submit a write-off proposal to the official in accordance with the applicable write-off authority using form. PS-03. Prohibited things:

- a. Write-off of bank receivables may not result in the release of debts/liabilities of the debtor.
- b. The write-off decision must not be notified to the debtor or any outside party.
- c. Write-off of the debtor's debt does not mean removing the name of the debtor from the Bad Credit List of Bank Indonesia.

4. Write-off Authority

The authority to decide write-offs of receivables rests with the Board of Directors, on the recommendation/recommendation of the Credit Division.

Advantages and Disadvantages of Books Write-Off

The advantages of books write-off:

1. The quality of the Bank's credit balance is getting better, the numbers of credit receivables that do not produce, arrears of loan principal, interest and penalties can be removed from the bank's balance sheet. Thus, the figures listed in the assets on the balance sheet better describe the actual condition of the bank's assets.
2. The quality of bank productive assets will be better, the level of Non-Performance Loans (NPL) will be low, so that it will increase the soundness value in the eyes of Bank Indonesia.
3. For credit receivables that have been written-off, the Bank can still make collections to the Debtor until it is paid off, including being able to execute credit collateral.
4. Banks can concentrate more on product development and business expansion without having to continue to be hampered by protracted non-performing loans.
5. BUMN/BUMD banks can avoid the potential for criminalizing bad loans, because write-offs already have a legal basis in the form of Government Regulations and Bank Indonesia Regulations (PBI).
6. Overall, it can be used to improve the banking system and national economic stability.

Potential Legal Problems Due to the Books Write-Off

1. The legal basis for writing off books is considered to be still not strong enough

The legal basis for write-offs used by BUMD banks today is Government Regulation No.33 of 2006 concerning Amendments to Government Regulation No. 14 of 2005 concerning Procedures for Write-Off of State/Regional Debts, in which the provisions of Article 19 and Article 20 concerning Procedures for Write-off of State/Regional Receivables / Region therefore the Management of State/Regional Company Receivables is subsequently carried out in accordance with the provisions of the applicable laws and regulations in the field of Limited Liability Companies and State-Owned Enterprises and their implementing regulations.

The legal basis for write-off in the form of a Government Regulation contradicts Law No. 17 of 2003 concerning State Finance which defines State Finance as also includes State assets which are separated in regional companies, as regulated in Article 2 (g):

State assets/regional assets managed by themselves or by other parties in the form of money, securities, receivables, goods, and other rights that can be valued in money, including assets separated from state companies.

If BUMD's assets are interpreted as being part of state/financial assets, then the write-off procedure must be carried out in accordance with Perpu No.49 Prp/1960 concerning the Settlement of State Receivable Affairs (PUPN), which is submitted to the Ministry of Finance and treated as state receivables for further settlement processes. carry on. The results of the collection of receivables by the Ministry of Finance are then returned to the BUMD that owns the receivables. Such a settlement takes a long and complex time so it is considered ineffective for the banking business.

Whereas up to now BPK RI still views that the legal basis used by BUMN/BUMD Banks is still not strong because Perpu No.49 Prp/1960 concerning the Settlement of State Receivable Affairs (PUPN) has not been revoked and Law No.17/2003 concerning finance not yet amended.

2. Write-off credit has the potential to be criminalized.

Until now, writing off books in the context of saving credit is still seen by several parties including the BPK and the Prosecutor's Office as a "big sin", so that the perpetrators must be punished, because it is often associated with the problem of criminal acts of corruption, one of which is "detrimental to state finances". By equating BUMD's wealth with state assets, write-offs are often identified as a form of state loss that can be linked to criminal acts of corruption.

Whereas the write-off mechanism is one of the efforts to save non-performing loans commonly used by banks and not all bad loans written off are criminal acts. To decide whether bad loans are included in the realm

of criminal law and corruption or not, it should be necessary to look at the process. As long as the credit decisions that end up bad are made based on business judgment, decided without any conflict of interest, and are accountable, it should not be declared wrongly. criminal.

The non-performing loan write-off mechanism is not regulated in the Articles of Association, but in Bank Indonesia Regulation No.7/2/PBI/2005 concerning Asset Quality Assessment for Commercial Banks as amended by the First Amendment in accordance with PBI PBI No. 8/2/PBI/2006, the second amendment pursuant to 9/6/PBI/2007 and the third amendment pursuant to 11/2/PBI/2009 article 69 to article 71, stipulates that the Bank must have an approved write-off and write-off procedure Directors and Commissioners. However, in our opinion, in order to better comply with the aspects of transparency and prudential principles, it is necessary to consider if the write-off and write-off procedures are carried out through the GMS mechanism and included in the Bank's Business plan, so that potential legal problems that arise in the future can be further minimized.

CONCLUSION

It can be concluded that the write-off mechanism is one of the efforts to save non-performing loans commonly used by banks and not all bad loans written off are criminal acts. To decide whether bad loans are included in the realm of criminal law and corruption or not, it should be necessary to look at the process. As long as the credit decisions that end up bad are made based on business judgment, decided without any conflict of interest, and are accountable, it should not be declared as criminal act. Even though write-offs have been carried out and collections written off, it is still possible to collect bad credit portfolios so that they can provide cash income to the bank. This kind of income must still be entered into the bank's books, namely in the post of other income, therefore it cannot be used as personal income for bank officials.

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