

Legal Protection of the Contracting Parties in The Peer To Peer Lending Based on Financial Technology (P2p Lending Fintech) in Indonesia

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Abstract-It has been commonly known that it is not easy for micro, small and medium enterprises (hereinafter referred to as MSMEs) and start up business to have access to the bank loans as a means of financing due to strict banking regulations imposed. These business really need financially supports by financier and legal protections from the government. In Indonesia, the category and classification of MSMEs is regulated in Act No. 20 of 2008. In digitalisation era, the legislation, and supervision have to adopt to the new innovation platform. In consequence, Financial Services Authority/ Otoritas Jasa Keuangan (hereinafter referred to as OJK) has prescribed about Lending Service Based on Financial Technology No.77/POJK.01/2016 and has established Circular Letter of the Financial Services Authority Number 18 / SEOJK.02 / 2017 on Risk Management and Governance on Lending Service Based on Financial Technology.

Based on normative methodoly research, the authors will apply conceptual approach in the light proximity of banking law and commercial jurisprudence perspective, this article will examine the characteristic of peer to peer lending fintech service and the mitigation risk of financial technology service in order to the legal protection for the contracting parties

Keywords-Characteristic; Peer to Peer Lending; Financial Technology; Mitigation Risk; Legal Protection.

I. INTRODUCTION

Along with the development of technology, especially the internet, the transaction in the field of credit is not only played by the bank, but also played by the other financial institutions to lending the money based on technology (financial technology). One of which is peer to peer lending based on financial technology (here and after is called P2P lending fintech). P2P lending fintech is a new innovation of financial services institutions, and for the entrepreneurs in Indonesia, it may still unacquainted with them. P2P lending fintech practices have long existed, but in different forms of agreements and they are still informal and they have been practiced offline for several centuries. After e-commerce is on the rise, many P2P lending fintech platforms in are emerging and expanding rapidly. This new innovation financial service is predicted to be bigger than the bank or tthe previous financial service institution.

Although it is new arrival as a platform, P2P lending fintech is experiencing rapid development and become popular as solution for micro, small and medium enterprises (MSMEs) that require the capital. Various P2P lending fintech which have entered Indonesia are Investree, Modal, Koinworks, Amarnya, and others. The increasing popularity of Peer to Peer Lending users and services have led to the need for a legal protection among the contracting parties in this platform. Therefore, the Financial Services Authority / Otoritas Jasa Keuangan (hereinafter referred to as OJK) prescribes the regulation about P2P lending service, one of them is the Regulation of the Financial Services Authority Number 77 / POJK.01 / 2016 About Money Lending Services Based on Information

Technology (hereinafter referred to as P.OJK No. 77 / POJK.01 / 2016).

Based on Article 1 number 3 of P.OJK No. 77 / POJK.01 / 2016, The P2P money lending fintech service is " the operation of financial services to bring together lenders with the borrower in the context of borrowing and loan agreements in rupiah directly through electronic systems using the internet network. "

In the general explanation P.OJK Number 77/2016 explained that this platform is very helpful in improving public access to financial services products online both with various parties without the need know each other. The main advantages are including the availability of electronic agreement documents online for the purposes of the parties, the availability of legal counsel to facilitate online transactions, risk assessment of the parties online, the delivery of online billing information , provision of loan status information to parties online, and provision of escrow accounts and virtual accounts in the banking to the parties, so that the whole implementation of the payment of funds takes place in the banking system.

In some ways between the P2P lending fintech service with the bank looks the same, that is they are based on the credit agreement. At first glance they differ only in terms of facilities that is the technology. However, the question arises whether P2P lending fintech service is also an intermediary institution such as a bank? If so, what is the pattern of legal relationships held by the parties? What is the risk of P2P lending fintech platform considering the parties do not require to know beforehand to sign the agreement? To answer those questions, it must analyze the characteristic of P2P fintech service, the risk of the Information Technology Based Money Lending Service and the legal protection of the parties in order to the risk mitigation. The Principle of Non-Discrimination As One of The General Principles In The Crc

The CRC has four general principles, they are the right to non-discrimination (Article 2), the best interests of the child (Article 3), the right to survival and development (Article 6), and the right to express opinions freely in matters affecting him/her and to have those views taken into consideration (Article 12).

Based on those general principles, the State Party must provide for and regulate the protection of all children under its jurisdiction from any kind of exploitation or abuse. Actions done by the State Party must be guided by the rights to protection from discrimination, the child's best interests, survival and development, and to express a view and have it respected.

Article 2 paragraph 1 of the CRC stipulates that States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. In addition, Article 2 paragraph 2 of the CRC provides that States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 2 of the CRC aims to ensure the prohibition of all forms of exemption and discrimination. The article also applies as one of the general principles in the CRC which affirms that all children are recognized in their rights without discrimination on any grounds.⁸ Article 2 of the CRC and its interpretation by the Committee on the Rights of the Child affirm that the state's obligation to avoid discrimination is an active obligation, requiring other aspects of implementation, a range of measures that include review, strategic planning, legislation, monitoring, awareness raising, education and information campaign, and evaluation of measures taken to reduce disparities.⁹

Non-discrimination is a fundamental principle in human rights law. It serves as the operational principle in key instruments of general human rights law.¹⁰ UDHR provides the provisions of non-discrimination in articles 2 and 7. In the next development, there are many human rights instruments have guaranteed the non-discrimination principle to ensure de facto equality of particular individuals and groups of people. Each of these instruments focuses comprehensively on the elimination of

discrimination on a certain ground. Besides the CRC, The most important international legal instruments against discrimination and inequality are the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹¹ Another important instrument against discrimination is the recent Convention on the Rights of Persons with Disabilities (CRPD). Those international human rights law instruments essentially have a two-fold aim, which are guarantees the non-discrimination and equal rights of particular individuals and groups, as well as special measures to ensure de facto equality (affirmative action).¹²

The CRC does not provide the definition of term “discrimination”. However, the terminology used in the Article 2 is the same as that of non-discriminatory provisions in other human rights law instruments. The Human Rights Committee, in its 1989 General Comment, emphasizes that “non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights”. The Human Rights Committee notes that “the term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms”.¹³

The Committee on the Rights of the Child has not issued a General Comment to interpret Article 2 of the CRC. However, the issue of discrimination has evolved in other General Comments in relation to the theme of the subject.¹⁴ In its first general comment, issued in 2001, the Committee stated, however, that ‘discrimination on the basis of any of the grounds listed in article 2 of the Convention, whether it is overt or hidden, offends the human dignity of the child and is capable of undermining or even destroying the capacity of

the child to benefit from educational opportunities.”¹⁵

In its General Comment No. 5 regarding the General measures of implementation for the Convention on the Rights of the Child (Article 4, 42 and 44 para. 6), the Committee notes that in its relation with Article 2, “This non-discrimination obligation requires States actively to identify individual children and groups of children the recognition and realization of whose rights may demand special measures. For example, the Committee highlights, in particular, the need for data collection to be disaggregated to enable discrimination or potential discrimination to be identified. Addressing discrimination may require changes in legislation, administration and resource allocation, as well as educational measures to change attitudes. It should be emphasized that the application of the nondiscrimination principle of equal access to rights does not mean identical treatment.”¹⁶

Additionally, In its General Comment No. 7 on the Implementing Child Rights in Early Childhood, the Committee on the Rights of the Child urges States Parties to identify the implications of the principle of non-discrimination to realize the rights of early childhood. The Committee argues that based on Article 2, young children in general must not be discriminated against on any grounds, for example where laws fail to offer equal protection against violence for all children, including young children. Young children are especially at risk of discrimination because they are relatively powerless and depend on others for the realization of their rights. The Committee also emphasizes that particular groups of young children must not be discriminated against. Discrimination may take the form of reduced levels of nutrition; inadequate care and attention; restricted opportunities for play, learning and education; or inhibition of free expression of feelings and views. Discrimination may also be expressed through harsh treatment and unreasonable expectations, which may be exploitative or abusive”¹⁷

The HRC goes on to emphasize that the “enjoyment of rights and freedoms on an equal footing, however, does not mean identical

treatment in every instance”. The principle of equality sometimes requires States Parties “to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.” And finally, it states that “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant”.¹⁸

The aim of the CRC is that children are born with fundamental freedoms and the inherent rights of all human beings and should not be discriminated against because they are children. Non-discrimination is one of the guiding principles of the CRC. It should imply that all rights apply to all children without exception and that the state has an obligation to put into place the means to ensure children are protected from any form of discrimination and to take positive action to promote their rights free of discrimination. In practice this requires a range of measures that include review, strategic planning, legislation, monitoring, awareness-raising, education and information campaigns, and evaluation of measures taken to reduce disparities.

II. THE CHARACTERISTICS OF PEER TO PEER MONEY LENDING BASED ON FINANCIAL TECHNOLOGY SERVICE

There are three contracting parties in this platform, those are:

1. service provider (P2P lending fintech service provider)
2. loan giver (funder)
3. loan receiver (borrower)

Service providers of Peer to Peer (P2P) lending fintech is a intermediary or a party who connects the loan giver and the loan receiver, therefore they have a right to get commission as mentioned at article 19 paragraph 2 POJK77/2016. The relationships between loan

giver (funder) and the service provider will be expressed in an electronic document. Afterwards, the agreement between loan giver and receiver mentioned in the agreement of loan giving. This agreement is mentioned in an electronic document. The service provider must provide information access to the loan receiver about the loan position that has been received. But the access of information not including information about the identity of the loan giver. It means the service provider is not informing about the loan giver identity. These thing becomes out of place because the loan giving agreement between the loan giver and the loan receiver is mentioning about the Identity of all parties so that the loan receiver understanding the identity of loan giver. The infelicity of that provision can also be found in an agreement between the service provider and loan giver that is the service provider obliged to provide information access to the loan giver about their funding usage. Information access not included in information related to the identity of a loan receiver. The information of the usage of the funding at least mention as follows:

- a. The amount of the funding being lent to the loan receiver
- b. The objective of the funding usage by the loan receiver
- c. The interest rate scale
- d. The loan time period

Even though service provider is not informing the identity of the loan receiver, but when the agreement of loan giving is taking place between the loan giver and the loan receiver then the loan giver understand the identity of the loan receiver.

Even though on P2P lending fintech is based on a credit agreement, there is the difference among the bank and P2P lending fintech. As public intermediary institution, Bank has function to collect the public funds and to channeling public funds. On the other hand, in P2P lending fintech has power of attorney

agreement which is made by the funder and the P2P lending fintech service provider as the financial service institution.

According to Article 1 number 2 of Law No. 10 of 1998 concerning Amendment to Law Number 7 of 1992 concerning Banking (hereinafter referred to as the Banking Act 1998), the bank is: "Business entity that collects public funds in the form of savings and distributes to the public in the form of credit and or other forms in order to improve the lives of the people. "This function is mentioned bank as an intermediary institution, namely the bank as collectors and distributors of public funds (financial intermediary).

As stated by Nindyo Pramono that the bank is a fiduciary financial institution, he has a mission and a very noble vision as an institution that is given the task to carry out the mandate of nation building for the achievement of improving people's standard of living. The position of the bank is not merely as an intermediary institution but also as an agent of development as defined in Article 3 and Article 4 of the Banking Act No.10 Year of 1998.

In the legal relationship of banks, banks act as intermediary institutions that collect funds through funds storage agreements and distribute them to borrowers through credit agreements. In contrast, in the legal relationship of P2P Lending Services, the service providers acts as an authorized institution under the power of attorney agreement. As a proxy, the P2P lending service is not authorized to collect customer funds or distribute it in the form of credit. The credit agreement in P2P lending fintech only binding to the contracting parties, to be specific only for the the lender and the recipient of the loan.

Related to the profit, the banks have authority in determining the saving interests and the credit interests as long as it's not violating the interests limit regulation determined by Bank Indonesia (Central Bank of Indonesia). So the banks acquires profit from the difference of saving

interest and credit interests. Meanwhile, the P2P lending fintech service provider acquires fee/ commission from their services, which are providing, managing and operating Fintech Service from the loan giver party to the loan receiver. Commission is a mutually agreed upon, or fixed by custom or law, fee accruing to an agent, broker, or salesperson for facilitating, initiating, and/or executing a commercial transaction. Financing fee is the the fee that a lender charge for a loan [1]. Commission is a mutually agreed upon, or fixed by custom or law, fee accruing to an agent, broker, or salesperson for facilitating, initiating, and/or executing a commercial transaction [2] which is prescribed in Article 1794 Burgerlijk Wetboek. The definition of commission in insurance according to M.Wahyu Prihantoro [3] is as follow: "Commission is part of the gross premium that agents, broker or insurance companies are entitled to, in relation to the service they give the closing of coverage, both directly and indirectly."

From the definition above, it can be concluded that agents and brokers and agents are entitled to commission. Whenever the marketing function is well established then the product marketing which will be relying on agents or minimizing the commission cost. The definition of commission according to the Indonesian language dictionary is compensation (money) or a certain amount percentage which is paid due to the service given in trading and etc. Commission also know in stock brokers in the stock market, brokers are a individual or a body that is carrying out the activity of trading stocks, for their own advantage or for other parties advantage, with the income characterized as commission or taking profit from the sale difference. Commission is income earned by the broker for the service they carry out in connecting the two parties or more in a transaction.

In the Financial Services Authority (OJK) Act No. 21 Year of 2011, OJK Law is an institution that conducts activities in the sectors of Banking, Capital Market, Insurance, Pension Fund, Financing Institution, and Other Financial Services Institution. As one of the forms of Lending Services based on Technology, according to Article 2 paragraph (1) of P.OJK 77/01/2016, Peer to Peer Lending fintech is included as other financial services institution. There are various opinions that consider Peer to Peer Lending fintech as part of a banking or financing institution. However, based on the definition of Article 2 paragraph

(1) P.OJK 77/01/2016 which has been described previously, Peer to Peer Lending fintech does not include both. Peer to Peer Lending has its own characteristics. The following will describe the characteristics of the lending service, especially P2P lending fintech, in terms of the following aspects:

a. Legal Contract or Agreement and Legal Relationship among The Contracting Parties

In Article 1313 Burgerlijk Wetboek (BW), the agreement is defined as "deeds". But the use of the term deeds for treaties is deemed less appropriate by jurists, because the scope of the word "deed" is still wide. The formulation of the agreement was changed from "deed" to "legal action" (*rechtshandeling*). The addition of the word "law" leads to a change in the sense that not all acts are included in the sense of covenant. In its development, the treaty is no longer a "legal act" but a "legal relationship" (*rechtsverhouding*) [7]. This view was put forward by Van Dunne who said that the agreement is a legal act is a classical theory, or conventional theory. According to Subekti, the engagement is a legal relationship between two parties based on which one party is entitled to demand something from the other, and the other party is obliged to fulfill that requirement

[8]. As is known, under article 1233 BW, one of the sources of engagement is a covenant, in other words a legal relationship arises when the contract is born, since "engagement" is the "legal relationship" as Subekti has described.

The term "agreement service provider" is not found in BW, but this agreement may be categorized as a power of attorney as provided for in Article 1792 -1819 BW. As applied to KoinWorks (PT Lunaria Annu Teknologi) and Investree (PT Investree Radhika Jaya). In this case the P2P lending fintech organizer is empowered to represent and act for and on behalf of the lender (proxy) to organize an affair. The meaning of "handle matters" is relating to the sustainability of the loan and lending agreement. What they do are "upon the

liaison" of the lender and all of the rights and obligations arising from the acts committed it becomes the rights and obligations of the lender.

Other authority granted to the service provider as the proxy of transferring, transferring and / or disbursing loan funds on behalf of the proxy to, and vice versa, transferring, transferring and / or disbursing the loan repayment by to the assignor (all of the previous instructions from the Authorizer). However, the service provider is not entitled to ownership of money, since the service provider is only the party acting on behalf of the lender, the money remains the property of the lender. Based on these relationships, as one of the financial services institutions, P2P lending fintech service provider is not an intermediary institution that collects and distributes funds from lenders but as the party receiving the power.

Agreement is manifested in the signing of the agreement by both parties. Once the agreement is signed, as long as the loan funds have not been sent to the escrow account, the borrower is not eligible to directly use or withdraw the loan even though the agreement is born. This will not be detrimental to the borrower because the period and interest rate are calculated from the

date of delivery of the full amount of the loan facility.

Before getting a loan fund, the prospective borrower must clearly state the purpose of using the loan fund. In the market place Investree categorizes the use of loans into 2 (two), namely personal loans and business loans. For personal loans, divided into 6 (six) purposes of use: home renovation, education, vacation, marriage, medical expenses, and motor vehicles. For business loans, divided into 2, namely invoice financing (bill financing) and Online seller financing (online business financing). The purpose of the use of funds is also regulated in Article 19 paragraph (3) jo paragraph (5) P.OJK 77/01/2016, where service providers are obliged to provide access to information to lenders for the use of funds. One of the information on the use of the funds contained is the purpose of utilization of funds by the recipient of the loan. Thus the purpose of the use of pinjaman funds can not be used by the borrower freely. However, no further stipulation concerning legal consequences if the recipient of the loan using the loan funds is not appropriate utilization. This is different from the lending agreements in BW that can freely use the loan funds.

According to the concept of Sutan Remy Sjahdeini [9], there are three characteristics that distinguish credit agreements from loan agreements are as follows:

First, the borrowing agreement of money is of a real nature, in which the agreement requires that in addition to the agreement, it still needs a real action that is the delivery of the goods that become the object. The nature of real in the loan agreement can be seen from the formulation of Article 1754 BW: "Borrowing is an agreement with which one party gives the other party a certain amount of goods that are exhausted because of the use of ...". The definitions given in Article 1754 BW clearly indicate the lending and borrowing agreement is a real agreement.

While the credit agreement is a consensus or real agreement, depending on whether the credit agreement contains a clause that is conditioned condition precedent or not. A condition precedent in a credit agreement is an event or event that must be fulfilled or occurs first after the agreement is signed by the parties before the creditor can use its credit. As long as the event or event has not been fulfilled, then the achievement obligation by the bank does not yet exist, although the legal relationship between the bank and the debtor customer already exists. The agreement with the condition precedent clause is a consensus agreement, that the credit agreement has been born since the signed credit agreement form as a consensus. However, once the credit agreement has been signed by the bank and the debtor's customer, it has not incurred the obligation for the bank to provide the credit as agreed, the debtor's right to withdraw credit or the bank's obligation to provide the credit, still depends on whether or not it has been complied with tough conditions or condition precedents. In essence, a bank credit agreement has been born without having to be followed directly to the delivery of credit. In contrast, credit agreements that do not include condition precedents include a real agreement.

Second, in the loan agreement, the debtor is entitled to use the money he has borrowed for any purpose. This is based on the provisions of Article 1755 BW which asserts that the party receiving the loan becomes the owner of the borrowed item. Therefore the owner is free to use the money, that the creditor has no right to interfere with the purpose of using the borrowed item. In contrast to credit agreements, that credit should be used in accordance with the objectives set forth in the credit agreement. The use of which deviates from its purpose creates a right to the bank to terminate the credit agreement unilaterally.

Thirdly, bank credit can only be used in a certain way, by using a check or a transfer order (typically by issuing a giro bill). Unlike the money-lending agreement, the money lent is

entirely handed over by the creditor to the debtor's powers with no requirement for how the borrower will use the borrowed money.

Based on the above description of the lending money agreement in Peer to Peer Lending Fintech clearly can not be equated with the lending agreement/ loan and borrowing agreement in BW, and more accurately categorized as credit agreement even though article 1 number 3 P.OJK 77/01/2016 uses the term "loan and borrowing agreement". Credit agreements commonly encountered in Banks are consensual agreements. The purpose of using loan funds in credit agreements should be clearly described. This is in line with the characteristics of the existing lending agreement in Peer to Peer Lending service fintech.

b. The Form of Legal Entity

In Article 1 point 6 P.OJK 77/01/2016 it is expressly said that service provider of P2P lending fintech shall be in the form of a legal entity. Based on Article 2 paragraph (2) P.OJK 77/01/2016, the form of legal entity is limited only for two forms, which is limited liability company (LLC) form and Coop form. Under The Act of Company Article 1 No. 40 Year 2007, LLC is a legal entity which is a capital alliance, formed under the agreement, conducting business with authorized capital divided into shares and fulfilling the stipulated requirements in this law and also its implementing regulations.

Based on Article 3 P.OJK 77/01/2016, the limited company legal services provider, may be established and owned by: (a) Indonesian citizens and / or legal materials of Indonesia; and / or. Furthermore, in the elucidation of article 3, it is related to "legal entity of Indonesia" such as central government, regional government, foundation, or LLC. In addition, foreign legal entities include naamloze vennootschap (NV), private limited (Pte. Ltd), or kid berhad (Sdn Bhd). P.OJK 77/01/2016 only regulates and

utilizes the services available, while the service provider in the form of a legal entity has not been regulated. Therefore, the ownership and the establishment of service providers in the form of coop refer to the Coop Act No 25 Year of 1992. The possibility of unregulated ownership and the establishment of service providers with legal coop is due to the fact that the parties concerned are only Indonesian citizens. While the ownership and

Establishment of a service provider with LLC may involve foreign citizens and foreign legal entities, as long as it involves Indonesian citizens and / or Indonesian legal entities as shareholder members. Ownership limits allowed by OJK include loose, which is a maximum of 85% (eighty five percent).

For registration, the applicant to become a service provider shall apply for advance registration to the Financial Services Authority through the Chief Executive of the Insurance Supervisor, Pension Fund, Financing Institution, and Other Financial Services Institution. Approval of application for registration within 10 (ten) working days of receipt of the application for registration. If it has been approved, OJK will provide a registered proof of registration. For service providers who have conducted P2P lending fintech service before regulation of P.OJK 77/01/2016 has been established, they must apply for registration to OJK no later than 6 (six) months after this OJK regulation is valid. The rules concerning the procedure of registration shall be governed by Articles 8-9 P.OJK 77/01/2016.

III. THE RISKS OF PEER TO PEER MONEY LENDING BASED ON TECHNOLOGY SERVICE IN ORDER TO LEGAL PROTECTION TO THE CONTRACTING PARTIES

It is not easy for MSMEs to have access to a bank loan as a financial means due to the requirements and special provision in-acted in bank regulations. Even though, these businesses

who are vastly in need of a financial support by the investor and a law protection by the government. Information technology based money lending services is the enforcement of financial service to bring together the loan giver (funder) and loan receiver (borrower) in order to achieve money lending agreement in rupiah currency directly through electronic system by using internet network. It's even mentioned information technology based money lending services being very helpful increasing the society access to financial services products via online to many different party without requirements to know each other. The main excellence of this information technology based money lending services are the availability of the agreement document in electronic format via online for all party's needs, the availability of legal attorneys to facilitate the online transaction, risks evaluation of all parties via online, the online deliver of debt collection information, the availability of loan status information to all parties via online and and the availability of escrow and virtual account in banking to all parties, so all the implementation of fund payment is occurring inside the baking system.

For this reason information technology based money lending services expected to meet the needs of quickly, easily and efficiently and also increasing the competitiveness. Besides, information technology based money lending services expected to be one of the solution to assist the business subject in a MSMEs, scale in acquiring funding access. However, with the excellence mentioned in the explanation of POJK77/2016 the risk that may be emerging from that activity cannot be denied, which are operational and credit risks. Prior to reviewing the risks that may emerge from information technology based money lending services, first, it will be reviewed about the characteristics of the information technology based money lending services. Information technology based money lending services activity is carried out by the provider service of information technology

based money lending services which will be referred to as provider service is Indonesian legal entity who provides, manages and operates information technology based money lending services.

In the activities of P2P lending fintech services there are some risk, namely operational risk and credit risk as mentioned in Elucidation of Article 21 PP 77 /2016, but there is no explanation about the meaning of credit risk and operational risk. Definition of the risk under the regulation of the Financial Services Authority No. 18 / POJK.03 / 2016 concerning the Application of Risk Management for Commercial Banks is different from the definition of risk in the law of obligation [10]. According to Mariam Darus Badruzaman, the risk is related to who should be indemnified. The debtor does not fulfill the achievement under force majeure. In the event of a breach of a promise (wanprestasi) due to the debtor's error, the indemnity shall be borne by the debtor [11]. It is also stated by Subekti that the risk is the obligation to bear the losses beyond the fault of one party. In example the stuff which it should be the object of trading were destroyed on the journey because the boat had an accident or the object of rental were burned out during the rental period. Who should bear that loss? It's a problem called risk. The risk issue stems from an event beyond the fault of one of the parties. In other words, stemming from the occurrence of the law of the covenant is called force majeure. The issue of the risk is the default/ wanprestasi is related to the damages.

On the other hand, the risk in banking contained broader meaning because bank risk includes credit risk, market risk, operational risk liquidity risk, legal risk, reputation risk, strategic risk and compliance risk. These risks are not limited to circumstances of coercion but also because of the fault of the debtor or the bank itself.

The risk of credit on P2P lending fintech service is the risk of failure of the recipient of

the loan in fulfilling the obligation to the lender, in which case the borrower has defaulted to the lender. According Subekti, wanprestasi means not fulfilling the obligations. Non-fulfillment of obligations by the debtor for two possible reasons:

a. Due to errors of the debtor, either by intent or negligence,

b. Because circumstances force (force majeure) beyond the ability of the debtor so that the debtor is not guilty.

Wirjono Prodjodikoro said that wanprestasi means the absence of an achievement, and achievement in the law of agreement means a thing that must be implemented as the contents of an agreement. Default can be three kinds:

a. The authorities do not carry out any promises

b. The authorities are late in implementing it

c. The authorities carry it out, but not the proper achievement.

On the one hand, P2P lending fintech platform provides financing solutions especially for MSMEs with no requirement of collateral. On the other hand, in the absence of a collateral requirement in the P2P lending fintech platform, the position of the lender is very risky because it is merely a concurrent creditor guaranteed only by a general guarantee as stipulated in Article 1131 BW. It means, the right position is to be the same with other concurrent creditors. Equality of position to the debtor's property is not preferred in repayment, even though among them there is a bill that first there. The general guarantee provided by law through Article 1131 BW is less favorable for economic actors because it is less effective to counteract the risks. The creditor competes with each other to obtain payment from the auction result, meaning his position is not preferred in repayment [14].

Other risk is the operational risk that may arise in the P2P lending fintech platform, such as

inefficiency of internal process, human error, system failure or external events affecting the operation of the service, considering the activity is done online with various parties without the need to know each other and all related

To such activities in electronic form online. All such activities are framed in an electronic system. Electronic Systems is a set of electronic devices and procedures that prepare, collect, process, analyze, store, display, publish, transmit, and / or disseminate electronic information in the field of financial services.

IV. REGULATION AND SUPERVISION OF OJK AS A LEGAL PROTECTION IN ORDER TO THE RISK MITIGATION

Risk mitigation is required to identify, measure, monitor and control credit risks and operational risks arising from all P2P lending service fintech in order to prevent and mitigate credit risks and operational risks. All of this effort requires proper regulation and supervision of OJK.

Regulation and supervision aims not to cause harm to P2P lending fintech service providers to minimize credit risk, protecting User's interests such as misuse of funds and User data, and protection of national interests such as anti-money laundering activities and preventing terrorism financing, as well as disruptions to the stability of the financial system.

Forms of legal protection set out in POJK 77/2016 and SEOJK 18/2017 are more for service providers. This is reasonable given the motor in the business of this platform is a service provider. Regulation of P2P lending fintech contains of obligations and prohibitions which it addressed to service providers include:

1. Service provider must submit registration and licensing to OJK and must make report periodically

2. Service providers are required to have human resources who have expertise and / or background in the field of information technology. Service providers should ensure that the required competencies are met well to ensure operational sustainability of the service provider.

3. Both service providers and users must perform risk mitigation. The form of risk mitigation by service providers that:

a. Service providers are required to meet the maximum limit of total lending of funds to each borrower. The maximum limit of total lending of funds is set at Rp.2,000,000,000 (two billion rupiah). OJK may conduct a review of the maximum limit of total lending.

b. Service providers are required to provide access to information to lenders for their use of funds.

c. Service providers are required to provide access to information to the borrower for the position of the loan received.

d. Service providers can work together and exchange data with service provider support services based on information technology in order to improve P2P lending fintech service quality.

e. Service providers are required to use escrow accounts and virtual accounts in the framework of borrowing services to borrow money based on information technology. Service providers are required to provide virtual accounts for each lender. In order to repay the loan, the borrower makes a payment through the escrow account service provider to be forwarded to the lender's virtual account. The purpose of the obligation to use virtual account and escrow account in service provider activity of P2P lending fintech service, that is prohibition for Service provider in doing fund raising society through account Service provider.

4. Service providers must meet the minimum standards of information technology systems, information technology risk management, information technology security, system resistance and system failure, and transfer of information technology systems.

5. Service provider shall provide audit track record of all its activities in P2P Electronic lending fintech service system. Service providers are required to ensure that the Information Technology system equipment used supports the provision of audit track records. Audit track records are used for surveillance, law enforcement, dispute resolution, verification, testing and other checks. Service provider is obliged to safeguard against information technology system components by owning and operating procedures and facilities for securing P2P lending fintech service in avoiding interruption, failure, and loss. Service providers are required to provide a security system that includes procedures, systems for prevention, and mitigation of threats and attacks that cause disruption, failure, and loss. Service providers must participate in the management of information technology security gaps in support of information security within the information technology services industry. The service provider shall re-display the Electronic Document in its entirety in accordance with the format and retention period specified in accordance with the provisions of the laws and regulations.

6. Service provider shall apply the basic principles of user protection, namely:

- i. transparency;
- ii. fair treatment;
- iii. reliability;
- iv. confidentiality and data security; and
- v. User dispute resolution is simple, fast, and affordable.

7. The Service Provider shall include and / or mention in any offer or promotion of services consisting of the Service Provider's name and / or logo and a statement that the Service Provider is registered and supervised by OJK.

8. Service providers shall implement anti-money laundering and terrorism financing programs in the financial services sector to the User in accordance with the provisions of laws and regulations concerning the implementation of anti-money laundering and terrorism financing programs.

9. Service providers are prohibited by any means, disseminate data, provide data and / or information about the User's personal to third parties.

10. In the event that the Service Provider uses the IT Governing Services provider, the Service Provider has full responsibility for the risks incurred from and to the rejected information technology. The use of IT governance providers should pay attention to the principles of prudence, sustainability, and risk management.

11. In addition to the preventive efforts, Article 47 POJK 77/2017 also has administrative sanctions when the service provider violates the obligations and restrictions set forth on POJK 77/2016 in the form of:

- a. written warning;
- b. fine, ie the obligation to pay a certain amount of money;
- c. restrictions on business activities; and
- d. revocation of permission.

In POJK 77/2016 and Circular of the Financial Services Authority Number 18 / SEOJK.02 / 2017 on Risk Management and

Governance of Lending service based on financial technology (SEOJK 18/2017), it is emphasized that risk mitigation must be performed by providers and users. The regulation of POJK 77/2016 and SEOJK 18/2017 emphasize more on the obligations and prohibitions for the service providers in order to protect the users of P2P lending fintech service. However, the legal protection for the lender that is related to the the certainty of his receivable payment from the borrower not set in POJK 77/2016 or SEOJK 18/2017. Therefore it is needed the proper regulation and supervision by OJK to mitigate the risk.

In Article 37 of POJK 77/2016 it is affirmed that the service provider shall be liable for user losses which it is arising from errors and / or omissions, the board of directors, and / or the Service Provider's employees. The meaning of "errors and / or omissions" in this article is errors and / or negligence in carrying out P2P lending fintech service activities, whether executed by caretakers, service providers and / or third parties working for the service provider's benefit. Therefore, the lender loses due to the non-performance of the obligations that the service provider ought to have made in accordance with the agreement then the lender may file the lawsuit on the basis of default. But, if such losses are due to errors and / or omissions that are supposed to prohibited under the POJK 77/2016, then the lender may file the lawsuit on the basis of an unlawful act. For example, the service provider is obliged to maintain the confidentiality, integrity and availability of personal data, transaction data, and financial data that it manages since the data obtained until the data is destroyed. However, the service provider in any way, disseminates the data, provides data and / or information about the lender's personal to a third party then the actions performed by the service provider has harmed the lender, the lender may file the lawsuit to the Court on the basis of unlawful conduct, in this case the service provider has violated Article 26 POJK 77/2016.

Similarly to the bank in granting loans, every P2P lending fintech service provider should need on six assessments (the 6 C's of credit analysis, namely Competence to Borrow, Character, Capacity, Capital, Collateral, and Condition of Economy) to decide whether the credit proposed by the applicant is accepted or rejected. The 5C analysis shall be performed by the bank to obtain confidence based on a thorough analysis of the willingness and ability of the debtor's customers to settle the debt as agreed. In the P2P lending fintech service business, does the service provider perform 5 C analysis on the prospective borrower? This still has not been regulated yet in POJK 77/2016 and SEOJK 18/2017. The 5C analysis should be performed by the service provider in assessing the prospective borrower as a form of legal protection for the lender. Considering every loan disbursed by the service provider is risky, the longer the loan period, the greater the risk the lender will have to bear.

V. CONCLUSION

1. P2P lending fintech service although at a glance have similarities with bank institutions, such as based on credit agreements and OJK supervised. But basically P2P lending service has different characteristics both in terms of their function, legal relationships, legal entity form, establishment and ownership, capital, type of business activities, and limitations of lending, and funds. In the legal relationship of banks, banks act as public intermediary institutions that collect funds through funds storage agreements and distribute them to borrowers through credit agreements. In contrast, in the legal relationship of P2P Lending Services, the service providers acts as an authorized institution under the power of attorney agreement. As a proxy, the P2P lending service is not authorized to collect customer funds or distribute it in the form of credit. The credit agreement in P2P lending fintech only binding to the contracting parties,

to be specific only for the the lender and the recipient of the loan.

2. The risk of P2P lending fintech service which may appear are credit risk and operational risk.

3. To prevent and mitigate credit risks and operational risks, risk management is required to identify, measure, monitor and control credit risks and operational risks arising from all borrowing and lending business activities based on information technology.

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