

## CHAPTER II

### LITERATURE REVIEW

#### 2.1 Theoretical Framework

##### 2.1.1 Theoretical Framework of Agreement

The interpretation of an agreement under Article 1313 has given rise to several expert opinions, which demonstrate a lack of definition for what an agreement actually means. One of which is Abdulkadir Muhammad in his book entitled "Indonesian Civil Law" that argues that the definition of a agreement formulated in Article 1313 The Civil Code has several weaknesses, which are:<sup>28</sup>

- a. It only concerns one party. This can be known from the formulation of the verb "to bind", its nature only comes from one side only, not from both sides. It should contain the phrase "to bind themselves together." There is therefore agreement between the two sides.
- b. The act in the article can also refer to actions without consent. The term "agreement" should be used instead of "action" because it encompasses both an unlawful conduct (*onrechtmatige daad*) that lacks consensus and the act of managing interests (*zaakwarneming*).
- c. The definition of agreement is too broad. Despite the fact that what is indicated by the agreement's definition being the agreement between debtors and creditors with regard to assets, the definition of agreement can be interpreted in marital agreement, which is regulated under family law. Book

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<sup>28</sup> Abdulkadir Muhammad, *Hukum Perdata Indonesia*, (Bandung: Citra Aditya Bakti, 2000) pg. 224-225

III of the Civil Code's definition of a "agreement" only refers to material, not personal agreements;

- d. The purpose of entering into an agreement is not indicated in the Civil Code's formulation of Article 1313, hence it is unclear for what the parties are committing themselves.

Therefore, seeing that the definition under Article 1313 of the Civil Code is still too vague and insufficient, legal experts have reformed what is meant by agreement. According to Subekti, an agreement is defined as a legal connection (concerning property assets) between two or more parties in which one party has the right to demand something from the other party and where others are required to comply with that demand.<sup>29</sup> Meanwhile, according to Abdulkadir Muhammad, an agreement is a legal relationship with two or more people binding themselves to each other to carry out an act in the field of law.<sup>30</sup>

The term for agreement is regulated under book III of the Civil Code regarding contracts. Under Article 1313 of the Civil Code, an agreement is defined as an act pursuant to which one or more individuals commit themselves to one another. According to how the article is written, an agreement that results in an engagement (*verbintenisscheppende overeenkomst*) or an agreement that is obligatory is what is intended by the definition of agreement in the article.<sup>31</sup>

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<sup>29</sup> Subekti, *Hukum Perjanjian*, (Jakarta: Intermasa, 2005) pg. 1

<sup>30</sup> Kadir Muhammad, *Hukum Perikatan*, (Bandung: Citra Aditya Bakti, 1990), pg. 6

<sup>31</sup> J. Satrio, *Hukum Perikatan, Perikatan Yang Lahir Dari Perjanjian*, (Bandung: Citra Aditya Bakti, 2001) pg. 11

Furthermore, there are five principles of an agreement that are known in civil law, according to a journal by M. Muhtarom, the five principles are:<sup>32</sup>

#### 1. Principle of Freedom of Contract

The principle of freedom of contract can be analyzed from the provisions of Article 1338 paragraph (1) of the Civil Code, which states: "All agreements made legally apply as law for those who make them." Therefore, this principle gives freedom to the parties to:

- a. Make or not enter into an agreement;
- b. Enter into an agreement with anyone;
- c. Determine the contents of the agreement, its implementation, and its requirements, and
- d. Determine the form of the agreement, whether written or oral.

#### 2. Principle of Consensualism

The principle of consensualism can be concluded in Article 1320 paragraph (1) of the Civil Code. In the article, it is determined that one of the conditions for a valid agreement is the existence of a word of agreement between the two parties. This principle states that agreements are generally not held formally, but only with the agreement of both parties. An agreement is commitment between a will and a statement made by both parties.

#### 3. Principle of Legal Certainty (*pacta sunt servanda*)

The principle of Legal Certainty or also known as the Principle of *pacta sunt servanda* is a principle related to the consequences of the agreement. The

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<sup>32</sup> M. Muhtarom, "Asas-Asas Hukum Perjanjian: Suatu Landasan dalam Pembuatan Kontrak", *Jurnal Suhuf*, Vol 26, (2014), pg. 50-53

principle of *pacta sunt servanda* is regulated in Article 1338 paragraph (1) of the Civil Code which reads: “All agreements made legally apply as law to those who make them.”

According to this principle, the parties must fulfill their obligations under the contract they entered. The *pacta sunt servanda* principle states that judges or other parties must uphold the terms of a contract formed by the parties as if it were a law. They cannot alter the terms of the agreement reached between the parties.

#### 4. Principle of Good Faith

The principle of Good Faith is stated in Article 1338 paragraph (3) of the Civil Code where an agreement must be carried out in good faith. This principle states that the parties must carry out the substance of the contract based on firm trust or confidence as well as the good will of the parties

#### 5. Principles of Personality

The principle of personality is the one that decides whether or not someone will enter into or form contracts that are just for their own benefit. It is referenced in Civil Code Articles 1315 and 1340. According to Civil Code Article 1315, "In general, an individual can commit only himself or agree to something on his own behalf.”

It is very evident from this clause that a person must only enter into an agreement for his or her personal advantage. According to Civil Code Article 1340:

“...agreements shall only be enforceable between the parties involved. They shall not be detrimental to third parties; third parties shall not profit from them, except in the event stipulated in Article 1317.”

It implies that only the participants to the agreement will be bound by it. There are exceptions to this provision as indicated in Article 1317 of the Civil Code which states:

"An individual may also enter into an agreement on behalf of a third party, if such agreement, which the individual concludes on his own behalf, or gift granted by him to another party, contains a provision in this regard. An individual, who has concluded an agreement, cannot revoke such, if the third party has declared his intent to exercise it."

The article above constructs that an individual is able to enter into an agreement contracts for the benefit of third parties, with certain conditions. Article 1320 of the Civil Code governs the agreement's legal terms. These circumstances include:

1. There must be consent of the individuals who are bound thereby:
2. There must be capacity to enter into an obligation
3. There must be a specific subject
4. There must be an admissible cause

Moreover, the first point of the article 1320 represents that consent signifies the parties to an agreement must reach it voluntarily, without the use of force, deception, or coercion, and they must agree on the agreed-upon contents. The second condition explains that each contracting party must have an "intention" to

enter into an obligation. The third condition for the validity of the agreement is that in making an agreement, what is agreed (the object of the agreement) must be clear. The fourth condition for the validity of the agreement is that it is not allowed to make an agreement to something that is prohibited by law, or which is contrary to the law.

### **2.1.2 Theoretical Framework of Corporate Funding**

According to Cerdasco, an investment made by a funder into a company is referred to as company funding. It's also known as corporate financing at times. Moreover, the purpose of funding is as a fuel for a business to run. Companies need funds for a variety of purposes, including:<sup>33</sup>

1. Starting a new business, for example to rent an office, new equipment and pay for advertising.
2. Running a business, for example to meet short-term liquidity and working capital or to finance commercial research.
3. Expand the business, for example to add new branches, buy production machines or build new production facilities.

Meanwhile, according to Investopedia, the corporate fund also known as "corporate finance" focuses on how businesses handle issues like funding sources, capital structuring, accounting, and investment choices. By using numerous methods and long- and short-term financial planning, corporate finance frequently

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<sup>33</sup> Ahmad Nasrudin, "Pendanaan Perusahaan: Tujuan, Jenis Sumber". <https://cerdasco.com/pendanaan-perusahaan/>, accessed by 20 October 2022

aims to maximize shareholder value. Capital investments and tax considerations are just two examples of corporate finance activity.<sup>34</sup>

A corporate fund purpose in a corporation typically requires outside funding or capital to expand their operations into new markets or regions. They can use it to fend off competitors or spend it on Research & Development (R&D). While companies do make an effort to finance these investments with profits from ongoing operations, it is frequently preferable to seek funding from lenders or investors on the outside.<sup>35</sup>

In general, company source funding can be classified by two ways, which are:<sup>36</sup>

- a. Corporate funding in terms of duration
- b. Corporate funding based on its source

When looking at corporate funding in terms of duration, companies can categorize it into:

1. Short-term funding, which has a duration of less than a year.
2. Medium-long-term funding, which has a period of two years or more.

In terms of its sources, there are two ways that can be utilized by companies, which are:<sup>37</sup>

1. Internal Corporate Funding

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<sup>34</sup> Adam Hayes, "Corporate Finance Definition and Activities". <https://www.investopedia.com/terms/c/corporatefinance.asp>, accessed by 20 November 2022.

<sup>35</sup> Investopedia, "What Are the Sources of Funding Available for Companies?" <https://www.investopedia.com/ask/answers/03/062003.asp>, accessed by 20 November 2022.

<sup>36</sup> Investopedia, "What Are the Sources of Funding Available for Companies?" <https://www.investopedia.com/ask/answers/03/062003.asp>, accessed by 20 November 2022.

<sup>37</sup> Ahmad Nasrudin, "Pendanaan Perusahaan: Tujuan, Jenis Sumber". <https://cerdasco.com/pendanaan-perusahaan/>, accessed by 20 October 2022

The funding originates from retained earnings inside the corporation. The business pays its shareholders a percentage of the total net profit realized as dividends. They keep the balance as retained earnings. Retained earnings can be used by businesses to fund business expansion or to cover operating expenses.<sup>38</sup>

## 2. External Corporate Funding

External sources of funding provide either debt or equity resources. Companies can raise capital on the stock market by issuing debt instruments or stock, or they can take out bank loans. In general, external funding sources can be categorized as follows:<sup>39</sup>

### a. Overdraft Facility

The bank will authorize the company to take out more money than the balance in its bank account up to the agreed limit.

### b. Factoring

Companies will sell their factors to financial institutions such as finance companies, where this effort is made to raise some cash directly.

### c. Capital stock

The company will instruct the owner to add capital to his company. Or it could be by issuing shares in the capital market to collect more cash.

### d. Line of Credit

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<sup>38</sup> Ahmad Nasrudin, "Pendanaan Perusahaan: Tujuan, Jenis Sumber". <https://cerdasco.com/pendanaan-perusahaan/>, accessed by 20 October 2022

<sup>39</sup> Arlyz Savan Religa, "Apa Itu Pendanaan Perusahaan? Simak Pengertian Lengkapnya". <https://blog.investree.id/marketplace-lending/apa-itu-pendanaan-perusahaan-simak-pengertian-lengkapnya/>, accessed by 23 October 2022.

Line of credit is an unsecured bank loan. At a certain phase, the bank will determine the maximum loan amount that can be claimed by the company for a certain period of time, usually within 1 year. Then, the company must pay a fee or a certain percentage of the loan in its checking account.

e. Revolving Credit

The additional costs imposed in revolving credit funding are not in the form of interest, and the term ranges from 2-5 years. This source of funds does not have a fixed installment amount. The company can withdraw, pay off, or withdraw the loan by any method and any number of times, until the revolving credit arrangement period ends.

f. Commercial Paper

Commercial paper is also defined as money market securities, and represents unsecured loans. Companies that issue commercial paper have the opportunity to obtain short-term funds to meet trade receivables or other liabilities with a maturity date of less than one year.

g. Grants

Funding from grants might come from the government or from specific organizations whose main goal is to support companies that meet certain requirements, including being environmentally clean or creating jobs in specific locations.

h. Peer to Peer Lending

Peer to Peer Lending (P2P Lending) is an online lending and borrowing platform. Micro-enterprises who need working capital to grow will connect

with lenders who are looking for alternative funding that is more profitable than conventional funding instruments.<sup>40</sup>

### 2.1.3 OJK

As regulated under Law Number 21 Year 2011 on Financial Service Authority Article 1, OJK is an independent institution and free from interference at the hands of the other party, which has the functions, duties, and regulatory authority, supervision, inspection, and investigation as referred to in this law. The integration of regulation and supervision is important so that overall supervision of activities in the financial services sector increases.<sup>41</sup> The purpose of creating OJK is to assure that the whole financial service activity will fulfill the following:<sup>42</sup>

- a. orderly, fair, transparent, and accountable execution;
- b. achieving a continuously developed and stable financial system; and
- c. protects the interest of consumers and society.

The regulatory framework and comprehensive oversight of all activities in the financial services sector are organized by OJK in accordance with Article 5 as shown above. This continues to the extent of OJK's supervision as indicated in Article 6, where it is mentioned that OJK performs regulatory and supervisory tasks to:<sup>43</sup>

- a. financial service activities in the banking sector;

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<sup>40</sup> Amartha, “Memodernisasi Pinjaman Mikro Lewat Teknologi”, [https://amartha.com/id\\_ID/carakerja/](https://amartha.com/id_ID/carakerja/), accessed by 28 October 2022

<sup>41</sup> Jonker Sihombing, *Otoritas Jasa Keuangan: Konsep, Regulasi dan Implementasi*, (Jakarta: Ref Publisher, Universitas Pelita Harapan, 2012), pg. 49

<sup>42</sup> Law Number 21 of 2011 concerning the Financial Services Authority, Article 4.

<sup>43</sup> *Ibid*, Article 6.

- b. financial services activities in the Capital Market sector; and
- c. financial service activities in the Insurance, Fund Pensions, Financing Institutions, and Service Institutions Other Finance.

To carry out regulatory tasks as referred to in Article 6, OJK has the authority to:<sup>44</sup>

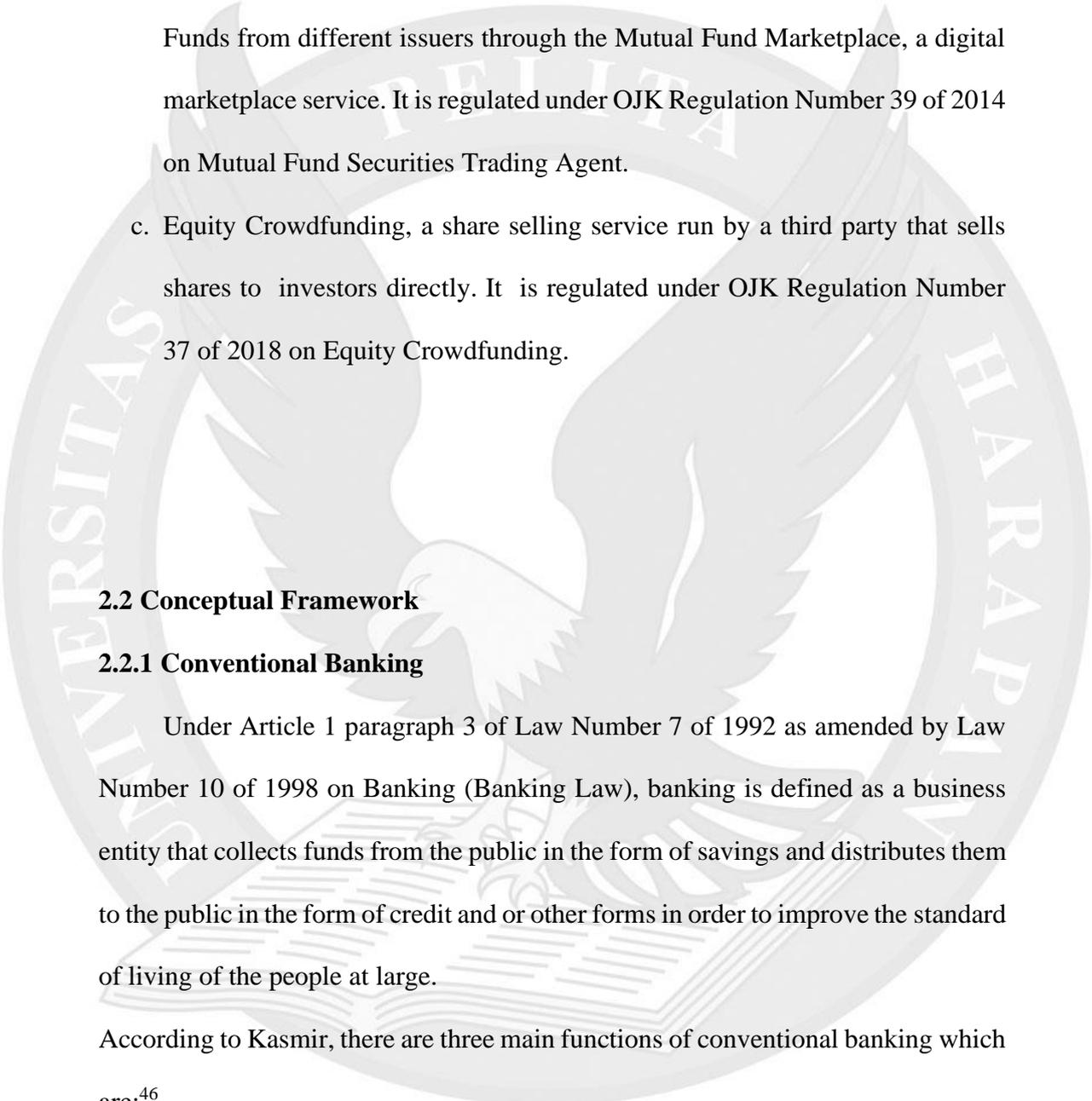
- a. stipulate the implementing regulations of this Law;
- b. establish laws and regulations in the sector financial services;
- c. stipulate OJK regulations and decisions;
- d. establish regulations regarding supervision in the sector financial services;
- e. establish policies regarding the implementation of tasks OJK;
- f. establish regulations regarding the procedure for determining written orders against Financial Services Institutions and certain parties;
- g. establish regulations regarding the procedure for determining statutory manager at Financial Services Institutions;
- h. establish organizational structure and infrastructure, and manage, maintain, and administer wealth and obligations; and
- i. establish regulations regarding the procedure for imposition sanctions in accordance with the provisions of laws and regulations in the financial services sector.

These are the fintech sectors that OJK regulates:<sup>45</sup>

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<sup>44</sup> *Ibid*, Article 8.

<sup>45</sup> Gaffar & Co Law Firm, “Types of Financial Technology Industry in Indonesia”. <https://gaffarcolaw.com/news-insights/types-of-financial-technology-industry-in-indonesia/>, accessed on 20 July 2022

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- a. P2P Lending, a digital lending service that uses an electronic system to connect lenders and borrowers. It is regulated under POJK 10/2022.
  - b. Mutual Fund Marketplace, it is a platform that offers a variety of Mutual Funds from different issuers through the Mutual Fund Marketplace, a digital marketplace service. It is regulated under OJK Regulation Number 39 of 2014 on Mutual Fund Securities Trading Agent.
  - c. Equity Crowdfunding, a share selling service run by a third party that sells shares to investors directly. It is regulated under OJK Regulation Number 37 of 2018 on Equity Crowdfunding.

## **2.2 Conceptual Framework**

### **2.2.1 Conventional Banking**

Under Article 1 paragraph 3 of Law Number 7 of 1992 as amended by Law Number 10 of 1998 on Banking (Banking Law), banking is defined as a business entity that collects funds from the public in the form of savings and distributes them to the public in the form of credit and or other forms in order to improve the standard of living of the people at large.

According to Kasmir, there are three main functions of conventional banking which are:<sup>46</sup>

1. Collecting funds

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<sup>46</sup> Kasmir, SE, MM, Pemasaran Bank, (Jakarta: Kencana, 2005), Pg. 9

Many banks serve as places for people to save money or make investments for society by collecting money from people in the form of savings.

## 2. Lending

The bank distributes funds to the public by giving them loans (credit). Depending on the customer's preferences, the given loans or credits are classified into different sorts. The bank determines whether the credit is deserved before extending it.

## 3. Services

A bank can offer remittances (transfers), clearing (collection of securities from within the city), *inkaso* (collection of securities from outside the city and overseas), letters of credit (L/C), safe deposit boxes (SDB), bank guarantees, bank notes, travelers' checks, and other services.

Regulated under Article 16 paragraph 2 of Banking Law, to obtain a Bank business license General and Rural Banks as referred to in paragraph (1), at least the following requirements must be met:

1. Organizational Structure of and Management;
2. Capital;
3. Ownership;
4. Expertise in Banking;
5. Feasibility of the work plan.

From the provisions of Article 16 paragraph 2, it can be inferred that when granting a business license as a commercial bank and rural bank credit, Bank Indonesia is required to pay attention to the level of healthy interbank

competition, the saturation level of banks in a given region, equity national economic development, in addition to the compliance requirements as intended in this verse.<sup>47</sup>

### **2.2.2 Peer to Peer Lending**

The term P2P Lending is governed by Article 1 Paragraph 3 of POJK 10/2022, which is as follows:

“Funding is the distribution of funds from funders to the beneficiary with a promise to be paid or returned in accordance with the term certain time in LPBBTI transactions.”

POJK 10/2022 explains that there are three parties to funding, namely Operators, Lenders and Borrowers. Under Article 1 of paragraph 8 define Operators as: “a legal entity that provide, manage, and operate LPBBTI either conventionally or based on the Principles Sharia.”

The parties regarding Lenders and Borrowers are further described in Article 1 Paragraphs 9 and 10 of POJK 10/2022. According to these paragraphs, Borrowers are individuals, businesses, and/or legal entities who receive funding, while Lenders are individuals, businesses, and/or legal entities who provide funding. According to OJK, the mechanism of P2P lending works as follows:<sup>48</sup>

1. Users (Lenders and Borrowers) register online via a computer or smartphone to the P2P platform they chose
2. The Borrower makes a loan application

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<sup>47</sup> Nurul Ichsan, *Pendirian Bank Umum dan BPR Konvensional atau Syariah*, (Tangerang: Jurnal Nisbah, 2018), pg. 36

<sup>48</sup> OJK, “Yuk Mengenal Fintech P2P Lending Sebagai Alternatif Investasi Sekaligus Pendanaan” <https://sikapiuangmu.ojk.go.id/FrontEnd/CMS/Article/20566>, accessed by 7 December 2022.

3. The P2P lending Operator analyzes and selects eligible Borrowers to apply for loans, including determining the Borrower's risk level
4. Selected Borrowers will be placed by the P2P lending Operator in the online P2P lending marketplace along with comprehensive information about the Borrower's profile and risks
5. P2P lending Lenders analyze and select Borrowers listed on the P2P lending marketplace provided by the platform.
6. P2P lending Lenders make funding to selected Borrowers through the P2P lending platform.
7. The Borrower returns the loan according to the loan repayment schedule to the P2P lending platform.
8. P2P lending Lenders receive loan repayments from Borrowers through the platform.

The Operators are entitled to register to the OJK and obtain a permit from OJK prior to executing their business activities.<sup>49</sup> Operators who have obtained a business license from the OJK are required to submit an application registration as an Electronic System operator to the competent authority no later than 30 (thirty) calendar days from the date of issuance of the permit business of the OJK.<sup>50</sup> The Board of Directors must submit an application for a business license to the OJK using format 2, which is listed in the Appendix and is a part of the OJK

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<sup>49</sup> Financial Services Authority Regulation Number 10/POJK.05/2022 Concerning Information Technology Based Collective Funding Services, Article 8 Paragraph (1).

<sup>50</sup> Financial Services Authority Regulation Number 10/POJK.05/2022 Concerning Information Technology Based Collective Funding Services, Article 8 Paragraph (2).

Regulation, in addition to the minimum number of documents specified in article 9 in order to obtain a business license as intended in article 8 paragraph (1).

### **2.2.3 Credit Agreement**

#### **2.2.3.1 Definition of Credit Agreement**

The definition of credit has been regulated in Article 1 number 11 of Law Number 7 of 1992 as amended by Law Number 10 of 1998, where credit has the following meanings:

“Provision of money or equivalent claims, based on an agreement or loan agreement between the bank and another party that requires the borrower to repay the debt after a certain period of time with interest.”

The definition of credit agreement has not been explicitly stated in Law Number 10 of 1998. However, in terms of credit in Article 1 number 11 of Law Number 10 of 1998, it can be concluded that a credit agreement is a money-lending agreement between a creditor and a debtor which requires the debtor to repay the debt (money) after a certain period of time with interest.

Based on the definition of credit as regulated in Article 1 number 11 of Law Number 10 of 1998, an agreement is a credit agreement if it fulfills the following elements:<sup>51</sup>

1. Availability of money or bills

Provision of money as the object of the credit agreement by the creditor. The creditor in the credit agreement is the fund provider who has agreed to provide a certain amount of money/funds, which is then referred to as the amount of credit or credit limit.

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<sup>51</sup> Bahsan, *Hukum Jaminan dan Jaminan Kredit Perbankan Indonesia*, (Jakarta: Raja Grafindo Persada, 2007), pg. 76

## 2. Agreement of the parties

The element of the agreement of the parties means that the creditor (creditor) and the credit recipient (debtor) agree to carry out the rights and obligations in the credit agreement.

## 3. Obligations to pay off debts

Obligations to pay off debts should be stated in a credit agreement. So the borrower (debtor) is obliged to pay off his obligations/debts according to what has been agreed and paid off on time.

## 4. There is a certain period of time

The time period specified in a credit agreement is the time limit for the financial institution's obligation to provide loan funds and the debtor's time limit to repay the loan.

### **2.2.3.2 Non-Performing Loans**

According to BFI, Non-Performing Loans (NPL) is a condition where debtors are unable to pay their installments or debts to the lender on time.<sup>52</sup> According to Dahlan, NPL are debtor loans that have difficulty in repayment due to intentional factors and or external factors beyond the debtor's control.<sup>53</sup> From these two perspectives, it can be inferred that NPL are those where the debtor finds it difficult to fulfill and carry out the duties under the credit agreement due to internal or external factors of the debtor's ability and control. In the context of P2P lending, NPL are defined as TWP 90. According to the explanation of Article

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<sup>52</sup> BFI, "Kredit Macet : Definisi, Penyebab, dan Cara Mengatasinya", <https://www.bfi.co.id/id/blog/kredit-macet-definisi-penyebab-dan-cara-mengatasinya>, accessed by 30 November 2022

<sup>53</sup> Mewoh, dkk, "Analisis Kredit Macet (PT. Bank Sulut, Tbk di Manado)", *Jurnal Administrasi Bisnis (JAB)*, Vol 4, Nomor 1, Februari 2016, pg. 5

101 under POJK 10/2022, TWP 90 is defined as a measure of default or negligence rate settlement of the obligations stipulated in the agreement Funding over 90 (ninety) days from the date due date.

According to the Financial Services Authority Regulation Number 40/POJK.03/2019 concerning Quality Assessment of Commercial Bank Assets (POJK 40/2019), what is meant by credit restructuring is an improvement effort made by a bank in lending activities to debtors who have difficulty meeting their obligations. Furthermore, Article 53 of POJK 40/2019 has regulate banks can only perform credit restructuring against debtors who meet the criteria:

1. Debtors have difficulty paying credit principal and/or interest;
2. Debtors that have good business prospects and is considered capable of fulfilling its obligations after the loan is restructured

Through the explanation of Article 53 of POJK 40/2019, credit restructuring can be carried out among others through:

- a. Reduction in loan interest rates;
- b. Extended period of loan;
- c. Reduction of principal arrears;
- d. The deduction of interest arrears;
- e. Additional credit facilities; and/or
- f. Conversion of credit into temporary equity participation;