



# LEGAL SETTINGS APPLICATION OF INCENTIVE AND DISINCENTIVE INSTRUMENTS IN THE BANKING CREDIT POLICY

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## ABSTRACT

The objective of the research is to find the concept of legal settings and application policies of incentive and disincentive instruments in the Banking Industry. The research method is normative juridical research by using approach of law and conceptual as well as literature study. The formulation of the problem in this study are: 1. How is the legal analysis of the application of incentive and disincentive instruments? 2. What is the concept of Legal Arrangement for the Application of Incentives and Disincentives instruments in the Banking Sector? 3. What factors become obstacles in Legal Arrangement of Incentive and Disincentive Instruments to Debtor Customers in Banking Credit Policy? The results show that the application of incentives and disincentives is still not running. Legal arrangements for the implementation of incentive and disincentive instruments in the banking sector need to be established. Factors that become obstacles in legal arrangement of application of incentive and disincentive instruments to debtors' customers in the policy of providing environmentally sound banking credit are internal and external factors.

Keywords : Legal Settings, Application, Incentives and Disincentives, Banking Credit Policy

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## **Preliminary**

### **A. Background**

Banking institutions have an important and strategic role not only in moving the wheels of the national economy, but also directed to be able to support the implementation of national development. This means that banking institutions should be able to act as agents of development in the effort to achieve the national goals, and no longer a burden and obstacles in the implementation of national development (Hermansyah, 2005).

Inevitably, Banks, Development and the Environment have become a chain that can not be separated from each other. How not, the development plan that will be done and the development that has been achieved so far, can not be separated from the banking role, especially as a provider of funds for the implementation of development projects (Hasanuddin Rahman, 2000).

Sutan Remy Sjahdeini mentions indirectly huge contribution of banks in environmental pollution through the provision of credit (Sutan Remy Sjahdeini, 1993). Long before banks began implementing AMDAL in credit assessment, Bank Indonesia issued Bank Indonesia Circular Letter Number: 21/9 / UKU dated March 25, 1989 regarding "Investment Credit and Equity Participation" (mandatory AMDAL), followed by Law Bank Indonesia Regulation Number 5/21 / PBI / 2003 concerning Second Amendment to Bank Indonesia Regulation Number: 3/10 / PBI / 2001 concerning Application of Know Your Customer Principles ), Bank Indonesia Circular Letter no. 7/3 / DPNP dated January 31, 2005 concerning Asset Quality Rating for Commercial Banks as the implementing provisions of Bank Indonesia Regulation Number 7/2 / PBI / 2005 dated January 20, 2005 regulates the Environmental Management Efforts of Debtors as one of the criteria in the assessment business prospects, especially large-scale Debtors having significant impacts on the environment, Bank Indonesia Regulation Number: 11/25 / PBI / 2009 concerning Amendment to Bank Indonesia Regulation Number 5/8 / PBI / 2003 concerning Application of Risk Management for Commercial Banks, Bank Indonesia Regulation Number: 14/15 / PBI / 2012 regarding Asset Quality Rating for Commercial Banks (banks are required to carry out an assessment of the debtor's business prospects related to the maintenance of the environment). In detail, this is stipulated in a Circular Letter to all Commercial Banks conducting conventional business activities in Indonesia Number: 15/28 / DPNP dated January 31, 2013, concerning the inclusion of Environmental Impact Analysis (AMDAL) and Rating Rating Corporate Performance in Environmental Management (PROPER).

Although Bank Indonesia has issued several regulations that must be complied with by the banking community in relation to the maintenance of the environment, there are still environmental pollution, such as forest and peat fires occurring in some parts of the island of Sumatra and Kalimantan that not only have an impact on financial loss, has also been socially and politically disadvantageous.

Based on recent data from the 2017 Greenpeace International Report indicating, banks have played a role in forest destruction in Indonesia and funding forest destruction for oil palm. Greenpeace highlighted HSBC Bank which provided capital of more than 16.3 billion US dollars (plus 2 billion US dollars) to six palm oil companies.

The current legal approach in handling and prosecuting environmental pollution activities, such as State Administration Law, Criminal Law and Civil Law has not been able to solve the problem of environmental pollution in Indonesia.

To prevent the occurrence of environmental pollution in the future, there is an economic approach to address the issue of environmental protection (Bismar Nasution, 2001). The economic approach is done by incentive method and disincentive to facilitate entrepreneurs in their effort to preserve the environment (Koesnadi Hardjasoemantri, 1999). This is in line with Posner's view of eliminating the dogmatic nature of the law, so that law enforcement can not be done by only using the normative approach, but it needs to be done with various approaches, such as: economic approach (A number of scholars believe that interpretation is the path to saving the law's objectivity) as Richard A. Posner puts it.

With the issuance of Law Number 32 Year 2009 on Environmental Protection and Management (UUPPLH), it has been regulated on Environmental Economic Instruments contained in Article 42 and Article 43 UUPPLH. In the provision of Article 42 paragraph (1) UUPPLH mentioned "In order to preserve the function of the environment, the Government and regional governments shall develop and implement environmental economic instruments". One of the Environmental Economic Instruments based on Article 42 Paragraph (2) UUPPLH is the incentive and / or disincentive that is applied in the form of development of financial institution system (in this case banking) that is environmentally friendly.

In line with the legal norms in the provisions of Article 42 and 43 paragraph (3) UUPPLH, therefore banks are also required to apply incentive and disincentive instruments to debtor customers in an environmentally sound credit policy.

The application of incentive and disincentive instruments to debtors' customers in an environmentally sound banking credit policy is a novelty, with the specific aim of banking from the beginning in the provision of credit to borrowers who have participated in prevention (preventive action) of environmental pollution and destruction and this is a significance of urgency (importance) in this study.

The targeted findings in this study is the existence of a legal arrangement for the application of incentive and disincentive instruments to debtors' customers in the policy of providing banking credit that is environmentally sound among banks, as mandated in Law Number 32 Year 2009 on Environmental Protection and Management .

With the legal arrangement of the application of incentive and disincentive instruments to debtor customers in banking credit policy, it is expected that the public can know that banks are also responsible in preventing the occurrence of environmental pollution and preserving the function of the environment as well as contributing to science in developing the banking system. friendly environment.

Based on the above description of the background, it is necessary to conduct research and research is very important to obtain a concept of legal arrangements that are relevant to the banking community for the application of incentive instruments and disincentives to borrowers in the policy of providing environmentally sound banking credit, so that banks can play a role in preventing the occurrence of pollution and environmental destruction in the future.

## **B. Problem Formulation**

Starting from the description of the background above, then there are some things that become legal issues in this study include the following:

1. What is the legal analysis of the application of incentive and disincentive instruments implemented in the form of development of an environmentally sound banking system?

2. What is the concept of Legal Arrangement for the Application of Incentive and Disincentive Instruments in the Banking Sector?
3. What factors are the obstacles in the Legal Arrangement of Incentive and Disincentive Instruments Implementation in the Banking Credit Policy?

### **C. Research Objectives**

Based on the problems that have been described above, then the objectives to be achieved in this study are:

1. To review and analyze legally the application of incentive and disincentive instruments implemented in the form of development of an environmentally friendly banking system.
2. To examine and learn about the concept of Legal Arrangement for the Application of Incentives and Disincentives Instruments in the Banking Sector.
3. To analyze and to know as well as to provide an overview of the factors that become obstacles in the Legal Arrangement of Incentive Instruments and Disincentives Implementation in the Policy of Banking Credit.

### **Research methods**

#### **A. Research Sites**

The location of this research is generally in the regulatory and supervisory institutions of Banking in Indonesia, namely the Financial Services Authority (OJK) in Jakarta, including the Eight largest banks in Indonesia or banks domiciled in Medan, and Non-Governmental Organizations (NGOs) engaged in environmental protection .

#### **B. Types and Nature of Research**

The type of research used in this study is Normative Juridical Research with the nature of the study is descriptive analytical.

The purpose of normative jurisdiction is that this research is conducted by focusing on reviewing the application of positive law principles and norms related to the protection and management of the environment and banking. Then the meaning of the analytical descriptive is that this study describes, examines and explains analytically or symptom of the approach of economic instrument, both normative and empirical in order to solve problems that have been formulated in legal issues, so on covering the principles of law, legal system and legal synchronization, legal history (or dynamics / development) and comparative law which in principle is nothing but the provisions of the regulatory authority.

#### **C. Data Collection Technique**

To obtain the necessary legal materials in this study, the data collection method (legal material) is used with library research (Library Research) and tools used to collect the legal material is through document studies.

#### **D. Data Analysis**

All legal materials that have been obtained either in the form of primary legal materials, secondary legal materials, and tertiary legal materials, are analyzed qualitatively. The legal material that has been obtained is systematized so that it will produce a certain classification in accordance with the formulation of the problems discussed in this study, then edited by grouping,

arranging systematically, and then done withdrawal conclusion by using the logic of thought from deductive to inductive.

## **Results and Discussion**

### **A. Legal Analysis Application of Incentive and Disincentive Instruments**

The incentive and disincentive instruments as one of the economic instruments of the environment are the legal norms contained in Law Number 32 Year 2009 on Environmental Protection and Management and Government Regulation Number 46 Year 2017 on Environmental Economic Instruments.

In Law Number 32 Year 2009 on Environmental Protection and Management, in Chapter X Article 65 to Article 69 regulates the Rights, Obligations and Prohibitions, which in Article 67 states: "Every person shall be obliged to preserve the function of the environment living and controlling pollution and / or environmental damage ". Furthermore, Article 42 Paragraph (1) states: "In order to preserve the function of the environment, the Government and regional governments shall develop and implement environmental economic instruments" (Article 1 point 32 of Law Number 32 Year 2009 on Environmental Protection and Management Life).

Environmental economics instruments as incentives and disincentives are implemented in the form of developing financial institution system (in this case banking) and environmentally friendly capital market (Article 43 paragraph (3) letter c of Law Number 32 Year 2009 regarding Protection and Environmental Management and Article 31 paragraph (1) letter d of Government Regulation Number 46 Year 2017 on Environmental Economic Instruments).

Considering that a bank is a legal entity (rechtspersoon) as referred to in Act Number 40 of 2007 concerning Limited Liability Companies Act Number 7 of 1992 concerning Banking as amended by Act Number 10 of 1998 and Undang- Of Law Number 21 Year 2008 concerning Sharia Banking, the bank as a legal entity (rechtspersoon) is obliged to maintain the preservation of environmental functions as well as to control pollution and / or environmental damage by applying incentive and disincentive instruments as an environmental economic instrument.

Although Law Number 32 Year 2009 on Environmental Protection and Management and Government Regulation Number 46 of 2017 on Environmental Economic Instruments is a law which regulates environmental issues. However, the above legislation also regulates the banking sector, particularly regarding the application of incentive and disincentive instruments.

To analyze the law can be done with a variety of approaches (approaches), one of which the economic approach (Hikmahanto Juwana, 1998). The economic approach to understanding the law includes the following approaches:

#### **1. Legal Understanding from the Corner of Economic Analysis**

Richard Posner in his book Economic Analysis of Law argues that the law is held to suppress or even to eliminate cost. Cost here should be understood not only as a cost, but also as a burden that must be borne or borne by a person or by a party. Thus, if the existence of the law increases the cost so that the burden borne by the people more and more, then such a law is not the law. Such a law can create disorder, in the case of the purpose of law is to bring order to society.

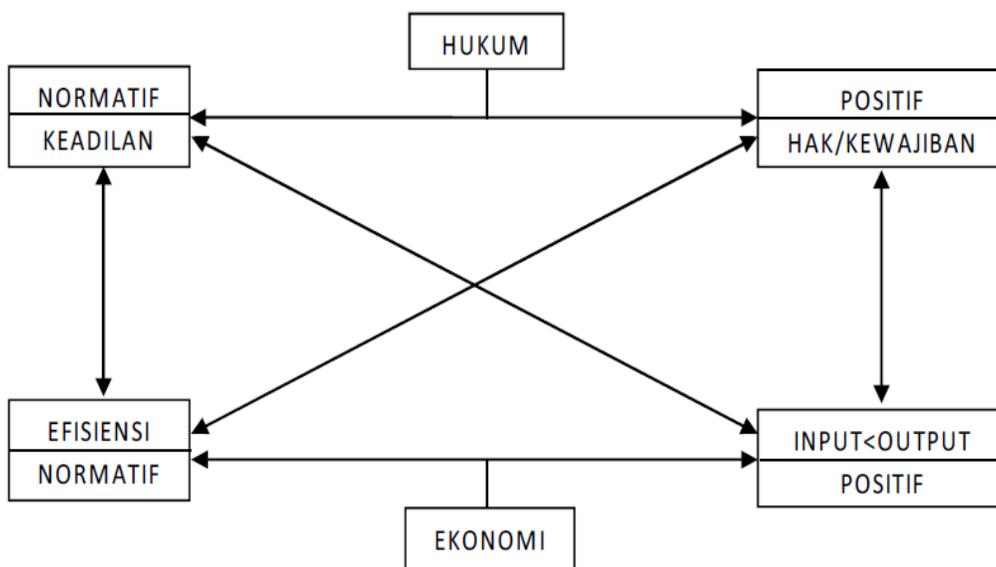
If the existence of a law creates a cost to society, then the lawmaker is responsible to change the law in accordance with the aspirations of the community in order to minimize and if possible eliminate the cost. In this connection, cost may also arise and become a burden of a party due to the application of law by other parties. Such cost is called external cost or

externalities. External costs incurred may be internalized by those affected by externalities to those whose actions incur externalities through legal proceedings, either through the courts or out of court.

## 2. Legal Understanding from the Corner of Legal and Economic Relations

Law contains legal norms to regulate the life of the people with the aim to realize justice. Such a law is called normative law. Justice as the goal of normative law will be realized through the implementation of normative law in the field. Normative law implemented in the field is the current law which is called the positive law or *ius constitutum*. Positive law will seek to realize the balance of rights and obligations as a reflection of justice as referred to by normative law. As with law, economics can also be understood as a normative economy that aims to realize efficiency by executing a positive economy to produce a state where inputs are always less than output (Figure 1).

Figure 1  
 Economic and Legal Relations



Source: Tommy Hendra Purwaka

Figure 1 above illustrates the relationship between law and economics which can be illustrated as follows: we can say that in living the life of a nation and a nation is "fair" if input is always less than output. That is, if the financing of national development always yields benefits for the greatest prosperity of the people followed by the reduction of state debt up to full, then such a situation is a reflection of a sense of community justice in which the right balance with the obligations. Thus, the life of the nation and the state viewed from an economic point of view is an efficient life. Conversely, if in the life of nation and state of input is always greater than the output (inefficient) shown the greater the debt of the state, then in such circumstances there must be many injustices in which many community members who lose their rights even though they each have implemented obligations. From the brief description of the legal and economic relations it can be concluded that law and economics are two sides of one coin.

### 3. Legal Understanding from the Corner of Benefit and Cost Analysis

Benefit and cost analysis have the ability to see the law as a rule that can provide benefits and / or burden (costs) to the community. There are four possibilities that occur as a result of the benefits and costs analysis of the application of the law, namely:

#### a. Diffused costs, diffused benefits

Diffused costs are a diffuse burden and diffused benefits are spread benefits. That is, the community equally bear the burden caused by the application of law and all members of the community enjoy the benefits of the application of the law. Such a situation is fair if the people who bear the burden and the people who enjoy the benefits are the same community. This situation becomes unfair if the people who bear the burden are different from the people who enjoy the benefits. For example, the benefits of applying the law are enjoyed by people in Java, while the burden is borne by the people outside Java.

#### b. Diffused costs, concentrated benefits

Diffused costs, concentrated benefits have the understanding that the burden of law enforcement is borne by the masses, while the benefits are enjoyed by a handful of people. Such circumstances are certainly not in accordance with the sense of community justice. Therefore, the application of the law should be strived not to produce such circumstances.

#### c. Concentrated costs, diffused benefits

Concentrated costs, diffused benefits means that the burden arising from the application of the law is borne by a certain group of people, while the benefits are enjoyed by the masses. This situation is ideal because it is very coveted by many people. A concrete example of such a situation is the subsidized fuel oil (BBM) carried out by the government that has alleviated the cost of living for many people.

#### d. Concentrated costs, concentrated benefits

Concentrated costs, concentrated benefits implies that the burden arising from the exercise of the law is borne by a few people and its benefits are enjoyed by a few people as well. Such circumstances reflect that the masses are not involved in the application of the law. Law is impressed as a tool used by a group of community members to meet their needs. Such circumstances should be avoided as they reflect an application of non-democratic law (Tommy Hendra Purwaka, 2015).

The obligation of banks to apply the incentive and disincentive instruments to the debtor's customers in the policy of providing bank credit as stipulated in the regulation / regulation issued by the Financial Services Authority (OJK) will be a reflection to preserve the environmental function and control the pollution and / or environmental damage.

### **B. Concept of Legal Arrangement for the Application of Incentive and Disincentive Instruments in the Banking Sector.**

The term "arrangement" actually refers to a more comprehensive understanding that includes the chain of legislation, standard setting, licensing, enforcement and enforcement (Andi

Hamzah, 1997). Law enforcement is the last link in the regulatory cycle and policy planning on the environment, which is the order of the following (Andi Hamzah, 1997):

1. Legislation;
2. Determination of standard (standard setting);
3. Licensing;
4. Implementation (implementation);
5. Law enforcement.

Prior to law enforcement, negotiations, persuasion and supervision should be held to ensure that legal regulations or permit requirements are adhered to, which is usually called compliance compliance. Environmental law enforcement includes the preventive and repressive facets, occupying the crossing points of the various areas of classical law, and can be enforced by either an administrative, civil or criminal instrument, or with all three instruments at once. Regarding the stages of environmental law enforcement then leads to the purpose of development of a State (Andi Hamzah, 1997).

The rule of law is an effective means of enforcing environmental policy, because the rule of law can be used as a means of social engineering. In this case the law acts to regulate and limit the behavior of individuals, groups, or legal entities in utilizing natural resources. Environmental law contains obligations that must be done by legal subjects and prohibitions to perform certain acts on the environment. Those who do not comply may be subject to sanctions, which are administrative sanctions, civil sanctions, criminal sanctions.

The role of environmental law is specifically described in *Caring for the Earth; A Strategy for Sustainable Living* (1991), which essentially is:

1. Give effect to policies formulated in support of the concept of sustainable development;
2. As a means of structuring (compliance tool) through the application of various sanctions (variety of sanctions);
3. Provide guidance to the community on the actions they can take to protect their rights and obligations;
4. Define rights and obligations and behaviors that harm the public;
5. Give and strengthen the mandate and authority to the relevant government officials to carry out their duties and functions (Mas Achmad Santosa, 1985).

Broadly speaking, environmental laws should provide the following containers:

1. Application of the precautionary principle. This principle is part of the Rio Declaration on Environment and Development which essentially emphasizes the importance of anticipatory measures as an effort to prevent environmental damage or losses;
2. Utilization of economic instruments through the application of taxes and other levies;
3. Implementation of environmental impact assessment for development projects and policy plans;
4. Enacting an environmental audit system for the activities of the private and government industries that have taken place.

However, in this study the discussion is only limited to the legislation (Article 8 paragraph (2) of Law No. 12 of 2011 on the Establishment of Legislation), as well as the implementation and enforcement of the law, as a source of formal law that serves to regulate or affect the behavior of legal subjects. The content of an environmental regulation can be identified based on the environmental policy instruments it uses. In the literature, there are attempts to classify environmental policy instruments (Asa Maria Persson, 2007).

Banking is anything that concerns about banks, includes institutions, business activities, and ways, and processes in conducting business activities, while the definition of the bank is a business entity that collects funds from the community in the form of savings and channeled to the community in the form of credit and or form (Article 1 paragraph (2) of Law Number 10 Year 1998 concerning Banking).

Business entity "Bank" is different from business entity or other business institution. Besides being a profit oriented institution, the bank is a trust institution, part of the national financial system and part of the national economic system. As an industry, banking is a pillar of the banking industry itself and other industries. Its existence is a system that must be strong, both individually and as a whole. The existence is interrelated, so that if there is one bank that collapsed, it will affect the other (systemic). As a consequence, the banking industry is the most regulated institution.

The banking industry has special characteristics (Hikmahanto Juwana, 1998). First, as one of the sub-systems of the financial services industry, the banking industry is often regarded as the heart and the motor of a country's economy. In this connection Lovett says: Bank and financial institutions collect money and deposits from all elements of society and invest these funds in loans, securities and various other productive assets (William A. Lovett, 1997). From what was put forward it can be said that without the banking industry is difficult to imagine the accumulation of money from society to be channeled in the form of credit in various industries. Secondly, the banking industry is an industry relying heavily on the "trust" (fiduciary) people who have money to keep. Community trust for the banking industry is everything (A. Tony Prasentiantono, 1997). The mistrust of the people in the banking industry can make the industry collapse in an instant. Currently Indonesia is feeling the true meaning of public trust in the banking world: a lesson to be paid with expensive. Actually what is experienced by Indonesia today has also experienced by other countries. In the United States, for example, the crisis of confidence often plagues the national banking system. Lash said that in the 19th century to enter the 20th century in the United States every 20 years there was a banking crisis as a result of unbelieving people in banking (Nicholas A. Lash, 1987). Given the two traits that differentiate the banking industry from industry in general, it is not surprising that the banking industry in many countries has always been the most heavily regulated industries by the government. It should be realized that the correlation between the banking regulation and the banking activity itself is very close. Walter said that, "... small changes in financial regulation can bring about trully massive changes in financial activity ..." (Ingo Walter, 1993). Therefore, the drafting or revision of laws and regulations in the banking sector and its enforcement must be done carefully with due regard to the economic consequences and in order to protect the banking function in the state economy and efforts to strengthen public confidence in the banking industry.

The reality shows that wherever the banking industry is the most government-regulated industry compared to other industries. The reason is because more banking activities depend on public funds so it needs to be guaranteed security certainty. In addition, the distribution of banking funds such as credit granting or securities purchases is a high-risk business, which if not managed properly can disrupt not only the viability of the bank itself, but also the banking system and monetary stability (Heru Soepratomo, 1997).

In Indonesia, banking arrangements have three main functions. First, the purpose of monetary stability in view of the dominant banking as a source of investment financing. Second, supervisory function in order to maintain the security and health of banks and the overall financial system, in order to create banking practices and fair competition between banks. In

addition, to protect customers and to maintain the stability of the money market, to encourage an efficient and competitive banking system and to respond to the community's need for quality financial services at a reasonable cost (Guidelines for Effective Banking Supervision, Basel Committee on Banking Supervision, BS 96/90 , Draft 11.11.96). Third, the objective of achieving development programs, in particular, is to tackle economic problems such as high unemployment, poverty, or the scarcity of investment resources. In accordance with the Law on Central Bank and Banking Law, banks in Indonesia assume the role of agents of development and are expected to contribute to efforts to increase national saving, to grow business activities and to increase the allocation of economic resources (Heru Soeprapto, 1997).

The above should be considered in conducting an economic analysis of the banking arrangements in Indonesia, both those involving government regulation as well as the costs incurred in connection with legal transactions conducted by the bank with its customers.

The legal arrangements for the application of incentives and disincentives to debtor customers in an environmentally sound credit policy are more focused on the bank to the debtor's customers as outlined in the bank's self-regulatory banking policy which the debtors will have to comply with (the Financial Services Authority has issued a Regulatory Authority Financial Services (POJK) Number: 42 / POJK.03 / 2017 regarding Liability of Preparation and Implementation of Credit Policy or Financing of Bank for Commercial Bank).

To support such efforts, the Commercial Bank shall have a Bank Credit Policy (hereinafter referred to as "KPB") in writing which at least contains all aspects stipulated in Decree of the Board of Managing Directors of Bank Indonesia no. 27/162 / KEP / DIR concerning Liability for the Preparation and Implementation of Credit Policy for Commercial Banks (hereinafter referred to as Guidelines for Bank Credit Policy Arrangement, or "PPKPB"). Decree of the Board of Directors of Bank Indonesia stipulated on March 31, 1995 is a credit guideline issued by Bank Indonesia and must be fulfilled by all Commercial Banks in Indonesia. The reasons for setting credit guidelines are:

- a. The Bank conducts business activities primarily by using public funds entrusted to the bank, so that the interests and beliefs of the community shall be protected and maintained;
- b. Lending is the main activity of the bank containing risks that may affect the health and sustainability of the bank's business, so in its implementation the bank must be based on sound credit principles;
- c. For the sake of the creation of a consistent crediting based on the principles of healthy credit as outlined in a written bank credit policy.

In addition to being a guide in the implementation of all activities in the field of credit, CDE also aims to optimize revenue and control the Bank's risk by applying the principles of consistent and consistent healthy credit. Thus, it is expected that the Bank can avoid the risk of credit failure and possible misuse of authority by irresponsible parties in the crediting process.

The KPB referred to at least contains and set the following principal points:

- a. Prudential principles in credit;
- b. Credit organization and management;
- c. Credit approval policy;
- d. Documentation and credit administration;
- e. Credit monitoring;
- f. Troubleshoot problem loans.

In CDEs, rules on the arrangement of granting to parties concerned with certain banks and debtors must be determined, credit that is high risk and credit that should be avoided, at least include:

1. Regulatory Matters concerning:
  - a. Healthy credit procedures, including credit approval procedures;
  - b. Documentation and credit administration procedures and credit monitoring procedures;
  - c. Treatment of loans in which interest arrears are capitalized (diplafondering loans);
  - d. Procedures for settlement of non-performing loans and procedures for write-off of bad debts and procedures for reporting bad loans;
  - e. Procedures for completion of collateral goods that have been controlled by banks obtained from the settlement of credit.
2. Principles of arrangement concerning lending to parties relating to certain banks and / or certain major debtors.
3. Economic sector, market segment, business activity and debtors with high risk for the bank.
4. Credit to avoid include:
  - a. Credit for speculative purposes;
  - b. Loans provided without sufficient financial information, provided that information for small credits may be adjusted as necessary by the bank;
  - c. Credits that require special skills not owned by banks;
  - d. Loans to debtors are problematic and / or stuck with other banks.

The parties involved in lending activities are bank officers in credit such as boards of commissioners, directors and other credit officers and / or work units within the organization of the bank. In addition banks are required to have Credit Policy Committee (KKP) and Credit Committee (KK). The CDE shall be explicit and clear the details of the functions, duties, authorities and responsibilities of the parties relating to the lending activities of the bank.

In the CDM of Commercial Bank must include at least the minimum credit approval policy covering the concept of the total credit applicant relationship, the determination of the credit authority limit, the responsibilities of the credit breaker officials, the credit approval process, the credit agreement, and the approval of loan disbursement.

Furthermore, Banks are required to meet the completeness of credit documents, check the validity of credit documents, and carry out the storage and use of good and orderly credit documentation. Banks are required to conduct credit supervision which includes supervision of loan-related officers, all parties relating to banks and debtors, and is required to conduct internal audit of credit which is a further effort in credit supervision to ensure that the loan has been in accordance with CDE and has complied with the provisions apply in credit agreement.

Although banks do not expect non-performing loans and with consistent and consistent implementation of CDEs it is expected that non-performing loans will arise, but all bank officers associated with credit must have the same views and perceptions in anticipating and handling the occurrence of non-performing loans. Therefore, banks are required to have CDE which contains bank policies and regulations in the event of non-performing loans.

Based on the self regulatory banking banks will be able to assess for themselves the impact of business conducted on the bank concerned, especially financial impacts and risks that may arise.

With the self regulatory banking, the Financial Services Authority (OJK) can establish the limits of the banking rules of the game (prudential banking regulation). Within these limits

banks have self-regulated freely as long as they do not violate the boundaries outlined. If this principle goes well, it is expected that the provisions in banking are not always changing.

The principles that need to be maintained in order to foster prudential regulation and self regulatory banking are:

1. The arrangement is not to protect the bank in the event of liquidation

This thinking is very important when viewed bank as an ordinary business entity that can develop and bias also destroyed (collaps). Rules contrary to this principle will undermine prudential banking regulation and self regulatory banking because banks will be encouraged to take more risks, thus jeopardizing the banks themselves and the entire banking system. This principle is in accordance with economic principles that believe that market mechanisms can create efficiency. Inefficient banks that do not have a strong self regulatory or violation of prudential regulation will be eliminated through market mechanisms. In the circumstances of a bank out of the real market that need to be protected are the creditors of the bank, especially the money-keeping community. The protection must also be with the economic mechanism, for example with insurance so that the public depositors are protected but by paying the insurance premium. This is particularly felt in countries that have customer protection schemes such as deposit insurance or other protection schemes such as pooling funds. The depositary customer should also be aware that any investments made, whether through bank or otherwise, always carry risks. From the various cases that have occurred, it is proven that the most significant problem of political impact in the liquidation of problem banks is the protection of depositors.

If a customer protection scheme exists, the government's political burden is not too heavy if it is forced to liquidate a problem bank. This is seen in the United States that often records the liquidation of banks but without causing significant shocks. This is in addition to the existence of deposit insurance, also because the community has been made aware to vote. If they choose a deposito without insurance, if something happens to the bank so they can not return the deposit they already know that that's their risk. Thus the protection scheme serves as a factor that neutralizes the specificity of the bank's business that the majority seeks based on third party funds. If there has been protection against third party funds, the settlement action against the problem bank can actually be done more easily.

It is with a note that not all countries in the world have a deposit insurance scheme. With certain considerations some countries, including Indonesia, have other ways of dealing with troubled banks.

2. The arrangement shall not replace the business decision of the banker in running the bank.

A business decision in a bank is a decision in running a business so it must be done by the bank itself with the internal restriction of the bank, which is self regulatory which among others regulate the procedures and authority. It should be noted that a regulation issued by BI (now OJK) is not intended to replace business decisions from bank management. Therefore, it should be noted that a rule is not too far to regulate something that is actually a business judgment. Legally there are different consequences in case of a legal problem with the bank, whether the problem is caused by a violation of the rules (prudential regulation), because it violates the self regulatory, or because of the lack of consideration of undertakings.

If it is caused by a wrong business decision, the bank administrator (based on the law of anglo saxon) can not be prosecuted by criminal law because of the legal concept of "business judgment rule". Violation of the self regulatory will result in the offending party being

responsible internally but the external violation of the self regulatory should not harm a good third party.

Based on these assumptions need to avoid the inclusion of things that are actually a pure business consideration to a rule. If this is the case then the regulatory authority may directly influence the success or failure of a bank's business. On the other hand, it should be realized that the banking business should always run on the rules. It is necessary to avoid severe legal consequences in the event of problems with a bank caused or accompanied by violations of various banking regulations.

An example that can be stated is about crediting. Law No. 7 of 1992 stipulates that: "In granting credit, commercial banks shall have confidence in the ability and ability of debtors to settle their debts as agreed." Furthermore, the Act gives the authority to BI (now OJK) to further regulate, among others, the maximum limit lending. Based on economic principles of balanced risk spread. BI (now OJK) through prudential regulation establishes a certain percentage of the bank's own capital as a limit of lending to a customer, a group of customers or to a bank "insider". As long as it is within the limits laid down the banks are free to give credit.

### 3. The arrangement shall not be applied discriminatively

Rules should be applied equally to all banks. Must not distinguish banks based on their ownership or size of the bank. The apparent exception to this principle is the difference in treatment between domestic banks and foreign banks or mixed banks. This is almost the case in all countries, although this is contrary to the principle of national treatment in General Agreement on Trade in Service. Based on the principle of national treatment, a country is required to provide services or foreign service suppliers of a no less favorable treatment than to a similar domestic service or service supplier

In relation to the regulatory banking arrangement, the Financial Services Authority has also issued the Financial Services Authority Regulation Number 42/POJK.03/2017 on the Obligation to Formulate and Implement Credit Policy or Financing of Bank for Commercial Banks. However, it is unfortunate that the Financial Services Authority Regulation No. 42 / POJK.03 / 2017 on the Obligation of the Implementation and Implementation of the Credit Policy or Financing of the Bank for Commercial Banks has not yet been concerned with the protection of environmental functions and the principles of environmental protection and management (Article 44 of Law Number: 32 Year 2009 on Environmental Protection and Management). In other words, the Regulation of the Financial Services Authority Number 42 / POJK.03 / 2017 concerning Obligation of Preparation and Implementation of Credit Policy or Financing of Bank for Commercial Banks is not yet a Regulation of Environmental Based Law as intended in Article 44 of Law Number: 32 of 2009 on the Protection and Management of the Environment.

As stated above, considering that banks are also obliged to maintain the preservation of environmental functions and control pollution and / or environmental damage by applying incentive and disincentive instruments as one of the environmental economic instruments, we expect banks to incorporate and apply incentive and disincentive instruments in credit or financing policies.

In the Policy of credit or financing of the Bank shall at least contain and regulate the principal matters as stipulated in the Banking Credit Policy or Financing Preparation Guidelines as follows:

1. the principle of prudence in credit or financing;

2. organization and management of credit or financing;
3. Credit or Financing approval policy;
4. Documentation and administration of Credit or Financing;
5. Credit or Financing supervision; and
6. Loan settlement or Non-performing financing

(Article 3 of the Regulation of the Financial Services Authority Number 42 / POJK.03 / 2017 on the Obligation of the Implementation and Implementation of Credit Policy or Financing of Banks for Commercial Banks).

If the Financial Services Authority (POJK) Regulation Number 51 / POJK.03 / 2017 concerning the Implementation of Sustainable Finance for Financial Services Institutions, Issuers and Public Companies is only directed to banks with the obligation to prepare a Sustainable Financial Action Plan, . 46 of 2017 on Environmental Economic Instruments shall be addressed only to the Central Government and the Regional Government.

In view of the Financial Services Authority (POJK) Regulation Number 51 / POJK.03 / 2017 on the Implementation of Sustainable Finance for Financial Services Institutions, Issuers, and Public Companies and Government Regulation Number 46 Year 2017 on Environmental Economics Instruments not yet regulated on Implementation of Instruments Incentives and Disincentives to debtor customers in an environmentally sound credit policy, it is necessary to formulate a more focused and comprehensive legal arrangement.

Following the Memorandum of Understanding between the Financial Services Authority and the Ministry of the Environment on Enhancing the Role of Financial Services Institutions in the Protection and Management of the Environment through Sustainable Development of Financial Services, by 2014, the Financial Services Authority and the Ministry of the Environment (organs of the Central Government) 32 Government Regulation Number 46 of 2017 concerning Environmental Economic Instruments states that the Central Government shall apply the Incentives and / or Disincentives as referred to in Article 31 to Everyone for: a). carry out legal compliance; b). Implementation of reward and punishment mechanism; c). distribute environmental impacts and risks fairly; d). innovate; e). undertake activities in the field of environmental protection and management beyond the required; and f). applying sustainable consumption and production patterns) made a Joint Decree on the Application of Incentive and Disincentive Instruments in the Banking Sector, this is in line with the explanation of Edi Setijawan (Interview, dated March 8, 2018) stating that OJK is currently coordinating and collaborating with Ministry / Government Agencies related to the assessment of the provision of incentive and disincentive instruments.

In the Joint Decree (SKB) between the Financial Services Authority and the Ministry of Environment is specially regulated on the Application of Incentives and Disincentives Instruments in the Bank's Self Regulatory Banking Policy as mandated in Law Number 32 Year 2009 on Protection and Environmental Management and Government Regulation Number 46 Year 2017 on Environmental Economic Instruments.

Another alternative is the Financial Services Authority (OJK) to amend the Regulation of the Financial Services Authority Number 42 / POJK.03 / 2017 on the Obligation of the Implementation and Implementation of Credit Policy or Financing of Banks for Commercial Banks with emphasis on each bank applying the Incentive and Disincentive instruments in the provision of credit or financing to debtor customers in order to comply with prudential principles in credit or financing.

Meanwhile, the Ministry of Environment applies the provisions in Government Regulation Number 46 Year 2017 on Environmental Economic Instruments especially the application of incentive and disincentive instruments with the Regulation of the Minister of Environment.

In Government Regulation No. 46 of 2017 on Environmental Economic Instruments, it is determined that Environmental Economic Instruments as an Incentive to engage in activities that have a positive impact on natural resources and environmental functions in the form of:

- a. granting liabilities relief;
- b. providing ease and / or relaxation of implementation requirements;
- c. provision of facilities and / or assistance;
- d. giving encouragement and guidance;
- e. recognition and / or appreciation; and / or
- f. a positive performance notice to the public.

(Article 31 paragraph (2) of Government Regulation No. 46 of 2017 on Environmental Economic Instruments).

For example, granting liability to debtors in case of credit obligations is to avoid Credit Risk and Restructuring Credit.

Credit Risk shall be the risk due to the failure of the debtor and / or other party in fulfilling the obligation to the Bank (Article 1 point 3 of the Financial Services Authority Regulation Number: 11 / POJK.03 / 2015 on Prudential Provisions in the Framework of the National Economic Stimulus for the Bank General), while Credit Restructuring is an improvement effort performed by the Bank in lending activities against debtors experiencing difficulties to fulfill its obligations, which are, among others, through:

- a. decrease of Credit interest rate;
- b. extension of Credit term;
- c. reduction of interest arrears Credit;
- d. reduction of arrear arrears of Credit;
- e. additional Credit facility; and / or
- f. Credit conversion becomes temporary capital participation.

(Article 1 Sub-Article 4 of the Financial Services Authority (POJK) Regulation Number 11 / POJK.03 / 2015 concerning Prudential Provisions in the Framework of the National Economic Stimulus for Commercial Banks).

Provision of liability relief to the debtor's customers in the case of tax obligations, user charges, and environmental subsidies. The application of taxes, levies, and environmental subsidies is used to provide monetary impetus to implement activities that have a positive impact on natural resources and the environment (Article 38 paragraph (3) letter b Government Regulation No. 46 of 2017 on Environmental Economic Instruments).

Meanwhile, the Environmental Economic Instrument that serves as a Disincentive to reduce the activities that have negative impact on natural resources and environmental functions in the form of:

- a. additional liabilities;
- b. addition and / or tightening of implementation requirements; and / or
- c. negative performance notice to the public.

(Article 31 paragraph (3) of Government Regulation No. 46 of 2017 on Environmental Economic Instruments).

For example, adding liabilities to debtors' customers in terms of tax obligations, user charges, and environmental subsidies. The application of taxes, levies, and environmental subsidies is used to provide monetary burden to reduce activities that have negative impacts on natural resources and the environment (Article 38 paragraph (3) letter c Government Regulation No. 46 of 2017 on Environmental Economic Instruments).

The above incentives and / or disincentives instruments are implemented in accordance with the provisions of the law (Article 31 paragraph (4) of Government Regulation Number 46 Year 2017 on Environmental Economic Instruments). In addition, the application of incentive and disincentive instruments may use other Environmental Economic Instruments, namely Environmental Funding Instrument (Article 3 (b) and Article 20 s / d Article 30 of Government Regulation Number 46 Year 2017 on Environmental Economic Instruments) and false one of Incentive and Disincentive instruments namely the application of taxes, user charges and environmental subsidies Article 31 letter d of Government Regulation Number 46 Year 2017 on Environmental Economic Instruments).

The Central Government and the Regional Government shall apply Incentives and / or Disincentives to Everyone to:

- a. carry out legal compliance;
- b. the implementation of reward and punishment mechanism;
- c. distribute environmental impacts and risks fairly;
- d. innovate;
- e. undertake activities in the field of environmental protection and management beyond the required; and
- f. applying sustainable consumption and production patterns.

Observing the mandatory context for the Central Government and Regional Government as referred to in Article 42 paragraph (1) of Law Number 32 Year 2009 on Environmental Protection and Management, various economic instruments shall be developed and applied in accordance with the purpose of utilizing such economic instruments, environmental management in Indonesia is able to run effectively and efficiently, fulfill prudential principles, and actually lead to sustainability, see General Explanation (third paragraph) of Government Regulation Number 46 Year 2017 on Environmental Economic Instruments.

Application of Incentives and / or Disincentives Consider national priorities (Article 32 Paragraph (2) of Government Regulation Number 46 Year 2017 on Environmental Economic Instruments).

### **C. Factors that become obstacles in the Legal Arrangement of Incentive and Disincentive Instruments Application in the Policy of Banking Credit**

Based on the observation of the researcher, the factors that become obstacles in the legal arrangement of incentive and disincentive instrument implementation are still not optimal the legal arrangement of the application of incentive and disincentive instruments to the banks. The Financial Services Authority (OJK) as authorized to regulate, supervise and protect for a sound financial industry, is currently issuing a Financial Services Authority (POJK) Regulation Number 51 / POJK.03 / 2017 on the Implementation of Sustainable Finance for Financial Services Institutions, Issuers , and Public Company.

The Financial Services Authority (POJK) Regulation Number 51 / POJK.03 / 2017 on the Implementation of Sustainable Finance for Financial Services Institutions, Issuers, and Public Companies is limited to appeal to banks in the implementation of sustainable finance. In

addition, with the issuance of Government Regulation Number 46 of 2017 on Environmental Economic Instruments, the government in this case the Ministry of the Environment has not issued a policy or regulation concerning the implementation guidelines of the application of such incentive and disincentive instruments.

The application of incentive and disincentive instruments required a Financial Service Authority (POJK) Regulation that instructs banks to apply Incentive and Disincentive instruments in their own banking regulatory banking policies to be performed by borrowers.

Another obstacle is the financial problem in the instrument as an incentive to engage in activities that have a positive impact on natural resources and environmental functions in the form of "liability relief". Whether the granting of liability relief should be a banking obligation or subsidized by the government.

To deal with financial problems in the granting of liabilities this obligation can actually use another Environmental Economic Instrument that is Environmental Funding. Article 20 up to Article 30 of Government Regulation Number 46 Year 2017 on Environmental Economic Instruments. Article 20 paragraph (2) states: "Environmental Funding Instrument as referred to in paragraph 91) may be a mechanism for the application of development planning instruments and economic activities and / or incentive and / or disincentive instruments". However, it is unfortunate that the implementation regulation on the management of Environmental Funding in the form of Presidential Regulation has not been issued yet.

Factors that become obstacles in the legal arrangement of the application of incentive and disincentive instruments are also inseparable from law enforcement in general. Factors affecting law enforcement according to Soerjono Soekanto are (Soerjono Soekanto, 2004):

### 1. Legal Factor

There are times when there is a conflict between legal certainty and justice, because the conception of justice is an abstract formulation, whereas legal certainty is a normatively determined procedure. Precisely, a policy or action that is not strictly law-based is justifiable as long as the policy or action is not contrary to law. So in essence the implementation of the law not only includes law enforcement, but also peace maintenance, because the implementation of the law is actually a process of harmony between the value of kaedah and the pattern of real behavior that aims to achieve peace.

### 2. Law Enforcement Factors

Legal functions, mentality or personality of law enforcement officials play an important role, if the rules are good, but the quality of the officers is not good, there is a problem. Therefore, one of the keys to success in law enforcement is the mentality or personality of law enforcement.

### 3. Factor Facilities or Support Facilities

Factor means or supporting facilities include software and hardware, one example of software is education. The education received by the Police today tends to be conventional, so that in many cases the police are facing obstacles in their objectives, such as knowledge of computer crimes, in special crimes which are still authorized by the prosecutor, technically juridical police considered not yet able and not ready. Although it is also realized that the task that must be carried by the police is so broad and many.

#### 4. Community Factors

Law enforcers come from the community and aim to achieve peace within the community. Every citizen or group at least has legal awareness, the problem that arises is the level of legal compliance, namely high legal compliance, medium, or less. The existence of the degree of legal compliance of the people to the law, is one indicator of the functioning of the law concerned.

#### 5. Cultural Factors

Based on the concept of everyday culture, people so often talk about culture. Culture has a huge function for people and society, that is, arranging for people to understand how to act, to do, and to determine their attitude when they relate to others. Culture, then, is a fundamental line of conduct that establishes rules about what to do, and what is forbidden.

### Conclusion

1. The application of incentive and disincentive instruments shall be implemented as mandated in Law of the Republic of Indonesia Number 32 Year 2009 concerning Environmental Protection and Management and Government Regulation No. 46 Year 2017 on Environmental Economic Instruments.
2. The application of incentive and disincentive instruments in the banking sector is implemented in the framework of developing an environmentally friendly banking system. The development of an environmentally friendly banking system is to include incentive and disincentive instruments in banking credit policy and implemented in credit agreements from individual debtors.
3. Factors which become obstacles in the legal arrangement of incentive and disincentive instrument implementation to debtor's customers in the policy of providing environmentally sound banking credit, consist of internal and external factors. Internal factor is the lack of readiness of banking circles to implement incentive and disincentive instruments. While the external factor is the awareness of public law in realizing the importance of maintaining the function of the environment.

Acknowledgments were conveyed to the DRPM Directorate General of Strengthening Risbang Kemenristek-Dikti who has provided assistance in this research cost.

### BIBLIOGRAPHY

#### Books:

Andi Hamzah, Environmental Law Enforcement (Jakarta: Saptar Arta Jaya, 1997).

Asa Maria Persson, "Choosing Environmental Policy Instruments: Case Studies Of Municipal Waste Policy In Sweden And England" (A thesis submitted to the Department of Geography and Environment of the London School of Economics and Politics of Science and Philosophy, 2007 ).

A. Tony Prasentiantono, Indonesia Economic Agenda, (Jakarta: Gramedia Pustaka Utama, 1997).

Bismar Nasution, *Openness In The Capital Market* (Jakarta: Faculty of Law University of Indonesia, Graduate Program, 2001).

Hasanuddin Rahman, *Environmental Credit Policy, Cet.1*, (Bandung: PT Citra Aditya Bakti, 2000).

Hermansyah, *Indonesian National Banking Law* (Jakarta: Prenada Media, 2005).

Heru Soeprapto, *Economic Analysis of Banking Law*, *Journal of Business Law*, Vol. 1, 1997, Business Development Law Foundation, Jakarta.

Hikmahanto Juwana, *Economic Analysis of Banking Law*, *Journal of Law and Development* Number 1 - 3 Years XXVIII.

Ingo Walter, *High Performance Financial Systems: Blueprint for Development*. (Singapore: Institute of Southeast Asian Studies, 1993).

Koesnadi Hardjasoemantri, *Environmental Governance Law, Seventh Edition* (Yogyakarta: Gadjah Mada University Press, 1999).

Mas Achmad Santosa, *Environmental Law Development in Long Term Development* (Jakarta: Indonesian Center for Environmental Law, 1985).

Nicholas A. Lash, *Banking Laws and Regulations: An Economic Perspective*, (USA: Prentice-Hall Inc., 1987).

Soerjono Soekanto. 2004, *Factors Affecting Law Enforcement, Fifth Matter*, Jakarta: Raja Grafindo Persada.

Sutan Remy Sjahdeini, *Freedom of Contract and Balanced Protection for Parties in Credit Agreement of Banks in Indonesia* (Jakarta: Institute Bankir Indonesia, 1993).

Tommy Hendra Purwaka, *Several Approaches for Understanding the Law*, *Journal of Law and Justice*, Volume 4, No. 3 November 2015.

William A. Lovett, *Banking and Financial Institutional Law*, (USA: Westpublishing Co., 1997).

**Legislation :**

Law No. 10 of 1998 concerning Banking.

Law No. 32 of 2009 on the Protection and Management of the Environment.

Law No. 12 Year 2011 on the Establishment of Legislation.

Government Regulation No. 46 of 2017 on Environmental Economic Instruments.

Regulation of the Financial Services Authority (POJK) no. 11 / POJK.03 / 2015 concerning Prudential Provisions in the Framework of the National Economic Stimulus for Commercial Banks.

Regulation of the Financial Services Authority No. 42 / POJK.03 / 2017 concerning Obligation of Preparation and Implementation of Credit Policy or Financing of Bank for Commercial Banks.

Guidelines For Effective Banking Supervision, Basel Committee on Banking Supervision, BS 96/90, Draft 11.11.96.

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