

JURNAL CITA HUKUM

Indonesian Law Journal



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Prevention Model of Disguised Crime in Indonesian Banking Facing the Deviation Actions of The Credit Use/*Side Streaming* by Debtor; Theoretical Review on Risk Management of Default Due to Side Streaming*

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Abstract

The purpose of this paper is to explore and conduct systematical research through reading materials (researching by reading) on the possibility of prevention steps to prevent or reduce the Deviation Actions of the Credit Use (Side Streaming) by Debtor in the Problem of Banking Credit Facilities Utilization in Indonesia. This paper is constructed by referring to one step of researching conducted by Ian Crow and Natasha Semmens in "Researching Criminology" (2006). It is stated that in researching by reading there are three approaches, they are (1) process of literature review; (2) process of reading and utilizing other people research findings; and (3) process of data analysis which is not used in researches, for example data taken from a writing in a newspaper or other mass media called content analysis. This research concludes that although the mode has been regulated in Law of Crime, the actions of side streaming have not been set up in banking crime actions in Indonesia. For the time being, side streaming occurs due to the availability of chances or opportunities and the possibility of using it to hide fraudulent misrepresentation actions.

Keyword: Prevention, Side streaming, Criminal Banking

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**Model Pencegahan Kejahatan Tersembunyi di Perbankan Indonesia
Menghadapi Tindakan Penyimpangan Penggunaan Kredit oleh Debitur;
Tinjauan Teoritis tentang Manajemen Risiko Kelalaian karena Side Streaming**

Abstrak

Tujuan dari makalah ini adalah untuk mengeksplorasi dan melakukan penelitian sistematis melalui bahan bacaan tentang kemungkinan langkah-langkah pencegahan atau mengurangi tindakan penyimpangan Penggunaan Kredit (Side Streaming) oleh Debitur dalam Masalah pemanfaatan fasilitas kredit Perbankan di Indonesia. Makalah ini dibangun dengan mengacu pada satu langkah penelitian yang dilakukan oleh Ian Crow dan Natasha Semmens dalam "Researching Criminology" (2006). Dinyatakan bahwa dalam meneliti dengan membaca ada tiga pendekatan, yaitu (1) proses tinjauan literatur; (2) proses membaca dan memanfaatkan temuan penelitian orang lain; dan (3) proses analisis data yang tidak digunakan dalam penelitian, misalnya data yang diambil dari tulisan di koran atau media massa lainnya yang disebut analisis konten. Penelitian ini menyimpulkan bahwa meskipun modus kejahatan ini telah diatur dalam Hukum Pidana, namun tindakan side streaming belum diatur dalam tindakan kejahatan perbankan di Indonesia. Untuk saat ini, Side Streaming terjadi karena ketersediaan peluang dan kemungkinan menggunakannya untuk menyembunyikan tindakan keliru penipuan.

Kata kunci: Pencegahan, Penyimpangan Penggunaan Kredit, Kejahatan Perbankan

**Модель предотвращения скрытой преступности в индонезийских банковских
услугах перед девиантностью использования кредита дебиторами;
Теоретический обзор риск-менеджмента небрежности из-за side streaming (использования
капитала не по назначению)**

Аннотация

Целью данной статьи является изучение и проведение систематических исследований путем чтения печатного материала о возможности превентивных мер или сокращения девиантности по использованию кредита дебиторами в проблемах использования банковских кредитных средств в Индонезии. Эта статья была подготовлена в рамках одноэтапного исследования, проведенного Яном Кроу и Наташей Семменс в «Researching Criminology» (2006). Утверждается, что при исследовании посредством чтения существует три подхода, а именно: 1) процесс обзора литературы; 2) процесс чтения и использования результатов исследований других людей; и 3) процесс анализа данных, которые не используются в исследованиях, например, данных, взятых из записей в газетах или других средствах массовой информации, называемых контент-анализом. В результате этого исследования мы пришли к выводу, что, хотя этот способ преступления регулируется в Уголовном законе, однако side streaming не регулируется законом о банковских преступлениях в Индонезии. На данный момент side streaming происходит из-за наличия возможности использовать его для сокрытия мошеннических действий.

Ключевые слова: предотвращение, девиантность по использованию кредита, банковские преступления

Introduction

It is noticed that the banking operational activities have high complexity in deviation, both in administration and/or in crime potential or fraud. To reduce the fraud potential, a bank has to apply cautious principles so that the bank can avoid the problem and the trust of those who save the money in the bank is well-maintained (Tampubolon, 2016).

One of the deviation forms in the banking world is misusing of facilities and utilizing the credit which will be and/or has been granted. Specifically, in Indonesia, this kind of deviation is recognized by banking people as “*side streaming*.” Literally, “side” means line or edge, while “streaming” means a flowing river. Therefore, the term *side streaming* simply and literally means being in the side of the edge of a river which is flowing as the mainline. This term is not the banking terminology; thus, it is not found in the international literature or journal on this matter. This terminology is only used to ease the bank, especially in credit management, to show the form credit deviation of credit misuse.

The synonym for the term is not the same as the meaning it contains, but probably “*stromanleningen*” from Dutch can be used as a reference as quoted by Sumitro Djojohadikusumo (1989: 206-220) from a monthly magazine, *Volkscreditwezen*, in his dissertation entitled “*Het Volkscredietwezen in de Depressie*”. It carries the meaning of a loan by using the third person to disguise. In Central Java this practice is known as “*tempelan*” and in East Java, it is called “*topengan*.”

According to Sumitro the practices are something that he worried the most when dealing with the credit management in rural areas (around 1920-1930). It is because this loan is the most difficult to recognize. The disguisers are people who were trained to give incorrect information. The misappropriation is detected when it is already going too far away, in which the amount of money is already so big that the rural committee is no longer able to conduct the “*tempelan*” ways to pay for the previous debt arrears. When the person whose name was used as the person who applied for the loan is asked to take the responsibility, she or he tells the actual story. The other synonym of side streaming terminology refers to criminology repertoire, that is *Fraudulent Misrepresentation* which means giving the incorrect information.

Riyanto (1990), an observer of banking problems in Indonesia, once described various deviations in daily banking activities (in the bank perspective as the offender), for example *window dressing*, setting up too high interest rate;

providing the convenience to get a credit without the usual consideration or assessment as the regular banking business world usually does. Especially when the credit is granted for the companies in the group ranges, and in a too big amount (Riyanto, 1991: 66-71).

Regarding the problems mentioned above, the efforts to prevent and to react towards the side streaming actions are necessary to take. It is based on the reasons as follows:

1. Up to the end of 2016, the Financial Services Authority (OJK) has taken down 108 cases on banking crime actions for two years in 2014-2016. There were 59 cases in 2014, declining in 2015 to be 23 cases; and 26 cases until the third quarter in 2016.
2. During the period, the most cases of fraud in banking are credit case (55%), making up records (21%), budget embezzlement (15%), budget transfer (5%); and asset procurement (4%).
3. Fraud offender is usually an in charged person who has the authority to make a decision and is related to banking operational activity arrangement.
4. Fraud in banking occurs a lot in Bank Perkreditan Rakyat (BPR), 80 % is closed due to fraud.
5. Therefore, OJK at the moment is working together with the law enforcement apparatus and banking industries to prevent the occurrence of banking criminal actions, and also to process the handling of banking criminal actions conjecture.

The questions are: Why is side streaming happening? What factors are the causes? How do we prevent and solve such factors?

Discussion

Some Factors Causing the Occurrence of Side Streaming

The factors causing side streaming theoretically can be seen from various perspectives; law, economy, social, culture, politic, psychology, and criminology, all of which integrate and summarize all factors to produce many theories, such as social learning theory (Sutherland, 1983: 240-255), opportunity structure theory or other theories about rational options provoking the deviation/crime (Shover & Hochstetter, 2006). Also see Michael L. Benson and Sally Simpson, 2009), and other theories which neutralize/ isolate/ obscure the

people perspective on a crime concept or label (Sutherland, 1983: 250-255). From the managerial side, it can be seen from the internal and external factors (Sinungan, 1987: 174).

Practically, in the perspective that the bank is the victim, the causing factors as general are: (a) the weakness of bank control and supervision; (b) debtor is not really serious in doing the efforts, or the debtor is a criminal ("mental bandit" as the sources call them), (d) the weakness in technical mastery of know-how of the debtor working areas.

As specific and fundamental, the causing factors can be seen from these three aspects: (a) when the prospective debtor is taking a feasibility test, (b) when the agreement is taking place, (c) when the law enforcement takes place after side streaming occurs (Yani, 2001: 200-202).

(a) When the prospective debtor is taking the feasibility test

The dominant factor is the minimum amount of information available on attitude, characteristics, and personality of the prospective debtor. It is because there is no standard/ benchmark for the banks. Banks only have a list of people or bank clients who are blacklisted by the Bank Indonesia or OJK. Complete information about clients is necessarily needed by the credit analysis officers to conduct the first stage of safety actions, by doing an analysis of the requirements and feasibility of the prospective debtor. It is also the weakness of first stage of safety system in credit risk management. The weakness is the factor causing a mistake or inaccurate analysis and assessment done by a bank officer when the credit application is proposed. The officer is not able to evaluate new and developing other things.

(b) When the agreement is taking place (during monitoring and evaluation)

The *side streaming* action in fact still causes different understanding and perception depending on the current situation definition. If it gives benefits to the debtor and the bank, this *side streaming* action tends not to have a rejection. On the contrary, if it causes disadvantages to the debtor that will be likely to disadvantage the bank as well, the *side streaming* action tends to get a negative reaction or rejection from the bank. The different understanding has caused the credit safety efforts in this stage both formally and informally not to run effectively, positively and consistently.

The causes can be tracked down. Seen from a formally legal aspect, the *side streaming* action has not yet been categorized as a banking criminal action. It is still considered as a civil violation (*wanprestasi*), or an administrative violation (violate the job conditions/credit granted process, see Gary S.Green, 1990: 8-10), and just leads to (is potential) criminal actions such as fraud, embezzlement, forgery, abuse of power, manipulation, and/or corruption, even though the model used is possibly done by giving incorrect information which is called *fraud misrepresentation*.

From criminological side, this kind of action is a part of a discussion on *white-collar crime* (Sutherland, 1940: 1-12; Mustofa (1991), in: Criminologist Review on Fraudulent Misrepresentation: UI-Press), in which it is faint/unseen and called a *hidden crime* (Hagan, in M.M. Lanier and S. Henry: Essential Criminology, 2004), hidden from society reproach which is usually known as *the invisibility of certain crime*, and produces *moral insensibility* in which the offender does not feel guilty because the person thinks that she or he only violate the rules (Ross and Van Hauvel, in Mardjono, Book 1, 1997: 87-89). It is difficult to prove since it has a possibility to be a perfect crime (Ronny R. Nitibaskara, 2007: 62) due to the fact that the banking industry is highly regulated industry (Ikatan Bankir Indonesia, 2015: v).

(c) When conducting Law Enforcement on Side Streaming Effects

In this stage, if *side streaming* effects cause the risk of law, the criminal law applied for the banking system is conducted according to the principles adopted, that is *ultimum remedium*, in which the criminal law will be put as the last effort. If all efforts on administrative and civil areas are unable to solve the problems of *side streaming*, it is related closely to the decision taken by the offender as an opportunity and rationalization of conducting *side streaming*. Law enforcement is done as the last effort mechanism as it requires adequately formal and material evidence. However, it is then potentially exploited by the offender as it is considered caring low risks compared to *side streaming* action itself.

Basically, this principle is suspending any law sanction applications. For the offender this principle is clear and rational, for example, the warranty rights owned by the bank are not necessarily able to be executed by the bank after *side streaming* action occurs. It is the weakness that can be seen in the system of security/control of banking credit risks in the last stage (See: The research

findings of H.P. Panggabean, Law Observer, in Soenoe Prawoto (1992, December 18: 2-7) and R.L.O. Block (1981: 155-156).

How to Prevent the Factors and Solve the Problems in Controlling the Credit Risks Regarding the *Side Streaming* Actions.

a. Concepts related to Credit Risks Control

Neil in his book entitled "*An Introduction to Risk Management*" 1st ed., Woodhead-Faulkner Limited, Cambridge, (1980: 11-12), points out that risk basically means uncertainty. As it develops, the need to control the risk also develops as well, both internally and externally, by not only focusing on insurance industry and warranty mechanisms but also framing the thought that it is necessary to control the business risk systematically and holistically so that it can be used by the businessmen in running their business, which is then known as *Enterprise Risk Management (ERM)*.

"According to Gregory (Gregory, M, 2008: 1 & 4.), enterprise risk management (ERM) can be defined as managing risks associated with the business objectives of an organization; risk refers to "the potential for loss caused by an event (or series of events) that can adversely affect the achievement of a company's objectives."

Meanwhile, according to Ikatan Bankir Indonesia (2015: 4), ERM can be defined as a process to manage the enterprise risks as a whole (*firm wide-basis*) which covers various risks, locations, and line of business.

Nevertheless, the increasing business growth, efficiency, and business risk management (in this case is the banking credit) often trigger a dilemmatic condition. For example: to make the credit volume bigger, the credit process is made faster, and the prudential standard needs to be loosened. It tends to increase credit risk. On the contrary, if the bank is too prudent in credit process, for example by adding the number of analysts so that the credit risks can be controlled, the process tends to be inefficient, takes longer time, more expensive and potential to make the clients seek for other banks that lead to the credit growth distractions.

In order to get the business goals, the bank needs to seek optimal balances in business, operational activities, and risk management. Here, the bank needs to have a business unit that is risk-oriented and at the same time owning a risk management unit that is business-oriented. Risk management is essential so that the bank is not trapped in some business with a historically

high profit or high margin but high risk as well. The bank tends not to realize that the big profit achieved in the past carries a high risk, fortunately some lucks could make the risk not exist as a disadvantage.

In addition, it seems that the risks of all business failure, especially those caused by fraud or deceiving actions, tend to happen and difficult to handle. In operational practices, businessmen or enterprises fail to put the fraud in ERM frame. According to Pickett (2006: 103, 120), it is because the problems of fraud are not put as the main point in risk management discussion in ERM frame, although the fraud is supposed to be put as the main point regarding the very serious risk it carries.

On the other hand, by considering fraud risks as something serious, according to *The American Institute of Certified Public Accountants (AICPA: 2009)*, we can have the meaning and policy of an effective anti-fraud, by focusing the four important elements in fraud risk settlement, they are: prevention, detection and deterrence and response.

The big number of businessmen/enterprises that fail in setting the fraud risk in ERM frame seems to occur in banking sectors as well. The causes are relatively the same, they are the problem in which fraud issue is not settled as the main point in the discussion on risk management of banking business as a whole, and also the problem caused by its own regulation aspect influences, which are made and enacted formally and tightly among a lot of banking operational rules.

The big number of formally law norms which regulates banks is a logical consequence of the bank function, role and position as an industry in financial area in capitalist society, where banking industry is one of the industries which is also a highly regulated one because it relates to the service and fund as well as trust management of the clients who put their money in the bank. (see: *Ikatan Bankir Indonesia, 2015: v*).

b. Integrated Credit Risk Management

Ikatan Bankir Indonesia (2015: 220) argues that at least there are 8 (eight) types of risks that the banks must face in running their business, they are market risk, liquidity risk, credit risk, operational risk, rule risk, reputation risk, strategic risk, and compliance risk. Therefore, the implementation of risk management must be applied by the banking industries. A range of global crises in the USA and Europe since 2008 is likely to affect the Indonesian

banking industries, thus risk management role is a lot more important to take seriously.

The role of risk management goes on well with the regulations, and it also gives a positive impact on internal banks by maintaining the resistance of them. It is because the risk is dynamic, with its continuously changing intensity and effect, and between one risk category and the other there is a tendency to have a high dependency on each other (*interdependent*).

The credit risk management aims to maximize *risk-adjusted return* and keep the credit risk exposure on an acceptable perimeter. Thus, the bank needs to manage its risk credit, both on individual level or transaction and on portfolio level. The credit risk management is not only the task of risk managers, but also the task of various credit business, which is conducted by three units with different task and responsibility, they are business unit (*relationship manager*), *credit risk management*, and *credit operation*. Each unit has a task and responsibility in managing the risk so that the credit business aims are reachable.

The risk of default (*probability of default*), which has been calculated based on the past expected loss, is charged as the component of credit interests. For unexpected loss of probability of default, the bank needs to prepare some amount of money to cover the loss due to the credit risk.

c. Side Streaming in White Collar Crime: Between the Probability of Default based on the Expected Loss and the Probability of Default based on the Unexpected Loss

Considering the types and effects caused by *side streaming* actions in credit risk management frame, *side streaming* can be put in the probability of default based on the expected loss category, at the same time it is also possible to be put in the probability of default based on the unexpected loss category, due to the following reasons:

The First; Side streaming, as the basic meaning it carries, is an action in misusing the credit facilities which is committed by a debtor beyond what was previously planned and agreed upon by both parties in one credit arrangement. In this matter, the *side streaming* occurs in the coming days after all risks have been calculated by the bank. Sometimes the deviation result benefits the debtor, and the debtor with a good willingness is able and willing to pay off his or her debts to the bank. At this point, *side streaming* actions does not cause a financial

and economic problem to the bank. On the contrary, sometimes the deviation result does not benefit the debtor, and even though he is willing to do it, it affects the debtor's ability and willingness to pay off his or her debts to the bank. At this point, *side streaming* action definitely causes a problem to the bank. The problem is it is potential to trigger the probability of default of the debtor which then influences the calculation of Adequacy of Minimum Capital Provision (*Kecukupan Penyediaan Modal Minimum = KPMM*) ratio and bank Risk-Weighted Assets (*Aktiva Tertimbang Menurut Resiko = ATMR*). In this last frame, the risk of *side streaming* action may have been calculated before or it is expected loss and the cost will be calculated as the component of credit interest rates for the debtor. However, since it is *side streaming*, it can be put in the unexpected loss category, thus the bank needs to prepare some amount of money to cover the loss due to the credit risk.

The second; The hidden criminal characteristics of *side streaming* lies on the "effects", not on the "actions." Both advantageous and disadvantageous effects cause negative impacts financially and non-financially for the banks as the economic institutions.

Conclusion

Based on the above explanation, it can be concluded that:

The first; Seen from its form and impacts, *side streaming* action in the current banking law aspect has not yet been put in an action violating the banking criminal law category. It is considered as an act violating the civil law and administrative law in banking regarding the terms and conditions in granting and utilization of banking credit facilities, in the other words, it is an act violating the rule of game in conducting the banking credit.

The Second; Seen from criminology aspects, *side streaming* action can be put in deviation/misuse of credit category which is included in white-collar crime. As defined by Edwin Sutherland, it is a crime committed by noble people regarding their positions and/or jobs, thus the conventionally criminal label becomes hidden/covered from the society reproach. In which their actions are not considered as crimes and they are not criminals, and for society it is considered only as a violation to the rule of game, which is on civil and administrative violations.

The third: In addition, *side streaming* if seen from the operational mode is an action of giving incorrect information which is potential to trigger a criminal violation in banking area, called *fraudulent misrepresentation*, which disadvantages the bank as an institution. Thus, *side streaming* is basically another form of *fraudulent misrepresentation*, which is a violation to civil law in banking areas, that is giving fake or incorrect information (see Article 47, 47a, and 48 UU No 10 1998 on Banking jo Article 58, 59 paragraph 2 UU No 13 1968 on the Central Bank, see also 263 and 264 KUHP on letter forgery/ scrap forgery, and see Article 378 KUHP on fraud).

The fourth; If we see it from causality aspect on why *side streaming* occurs, there are theories about the structure of opportunity and rationality on the occurrence of a crime. One of them is declared by Neal Shover and Andy Hochstetler (2006), stating that the offender consciously chooses to commit the crime after carefully considering the loss and profit. In other words, someone commits a crime because there is a chance available nearby and it can be done easily, as stated by Michael L. Benson and Sally S. Simpson (2009).

The fifth: Due to its position in the law framework of banking, its nature, operational mode, and the structure of opportunity and rationality covering *side streaming* mentioned previously, *side streaming* actions possess an isolative function which may be needed by the offenders to secure the learning process and socialization on rationality in running the business by applying the ways disadvantaging the others and the fraudulent business practices.

Regarding the research findings through the literature review, there is a need to consider the following ideas as recommendations, they are:

The first; Considering the characteristic of *side streaming*, it is an action of which operational mode is basically a *fraudulent misrepresentation* action. Thus, it needs to consider to sort out the actions, which ones can be considered as a criminal law violation and which ones are only violations to the rule of the game in organizing and utilizing the banking credit facilities in a form of administrative and civil violations.

The second; In order to prevent *fraudulently* or a crime in banking area, based on the previous research findings, we need to put the *side streaming* actions in the frame of *Enterprise Risk Management (ERM)* as the focus on credit risk management, since it is a serious risk.

The third; Therefore, in fraud risk management it is necessary to conduct a preventing action to the fraud with well-planned responses, or an internal

reaction so that the dangerous consequences due to the fraud can be controlled and prevented.

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