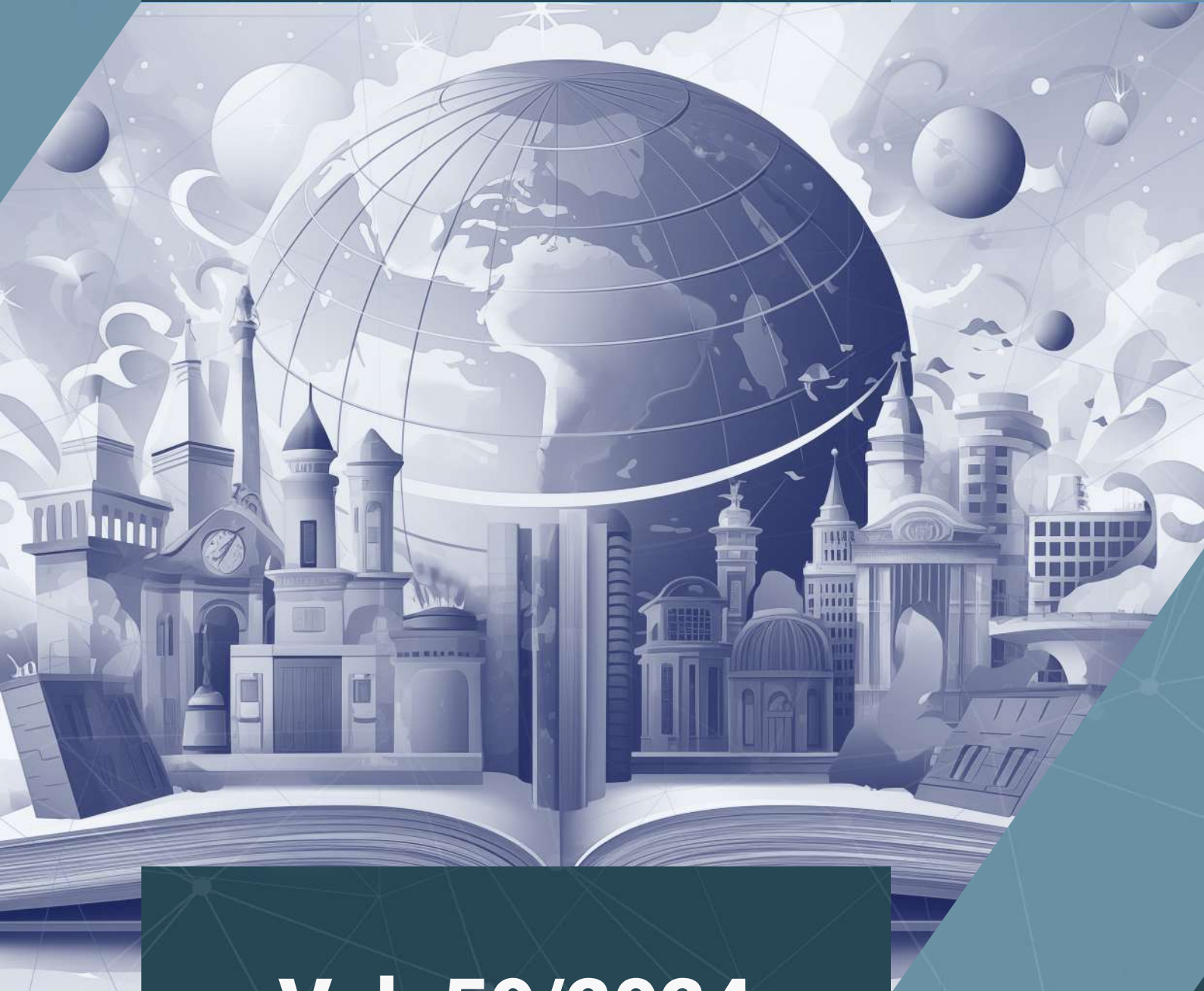




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## The dynamics of the authority to investigate banking crimes

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**Abstract.** Banking crimes, not only disrupt the stability of country's economy, and violate the human rights of Bank customers, to live free from fear guaranteed by Article 28G paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which is formulated: "Every person shall have the right to protection of his/her person, family, honor, dignity, and property under his/her control, and shall have the right to security and protection from the threat of fear to do or not to do something which is a human right". In addition, the Banking crime is also contrary to the value of justice that should be realized through positive law and its law enforcement.

**Keywords.** banking; crime; investigate

### Introduction

Banking crimes, not only disrupt the stability of country's economy, and violate the human rights of Bank customers, to live free from fear guaranteed by Article 28G paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which is formulated: "Every person shall have the right to protection of his/her person, family, honor, dignity, and property under his/her control, and shall have the right to security and protection from the threat of fear to do or not to do something which is a human right". In addition, the Banking crime is also contrary to the value of justice that should be realized through positive law and its law enforcement.

To prevent the occurrence of banking crimes, Bank Indonesia has conducted supervision of banking activities, through Law Number 23 Year 1999 Jo. Law Number 34 Year 2004 on Bank Indonesia, which involves an independent institution, established by government. Such supervision is mandated by Article 34 paragraph (1) of Law Number 34 Year 3004 on Banking, which stipulates that task of Bank supervision will be carried out by an independent financial services sector supervisory institution established by law.[1]

The mandate of Article 34 paragraph (1) was subsequently established by Law Number 21 Year 2011 on the Financial Services Authority (UU-OJK), and in 2014 Bank Indonesia Regulation Number 16/11/PBI/2014 on Macroprudential Regulation and Supervision was issued. The granting of authority to OJK to supervise banking may cause problems in connection with the authority of OJK as stipulated in Article 9 letter c of the OJK Law, which authorizes OJK to "conduct supervision, examination, investigation, consumer protection, and other actions against Financial Services Institutions, actors, and/or supporters of financial

services activities as referred to in laws and regulations in the financial services sector". With this authority, the investigation of banking crimes is carried out by Police Investigators, and also OJK investigators in accordance with their respective authorities.

The authority of OJK investigators is regulated in OJK Regulation Number 22/OJK.01/2015 concerning Criminal Investigation in the Financial Services Sector. OJK Regulation Number 22/POJK.01/2015, which gives OJK discretion in investigating criminal acts committed by financial institutions, meaning without waiting for reports and or complaints from the public. The problem that is feared is the possibility of overlapping authority between Police investigators and OJK investigators, even Police investigators will lose their authority in investigating banking crimes, in connection with the issuance of Law Number 4 of 2003 concerning Strengthening and Development of the Financial Sector (UU-PPSK), which in the provisions of Article 49 paragraph (5) of the UU-PPSK, determines that "Investigation of criminal acts in the service sector can only be carried out by investigators of Financial Services Authority". The phrase "can only" indicates that OJK is the sole investigator in banking crimes.

### **Problems**

The dynamics of authority to investigate banking crimes in realizing legal certainty. The purpose of research is to analyze and find the dynamics of authority Police investigators in conducting investigations of banking crimes in an effort to realize justice.

### **Research Method**

This research is a normative legal research.[2]

### **Results Method and Analysis**

#### **Banking Crimes**

There are 2 kinds of criminal terminology related to banking, namely banking crime and criminal offense in the field of banking. Banking crime is a crime that has been determined in Law Number 7 of 1998 jo. Law Number 10 of 1998 on Banking. In Bank Indonesia Circular Letter No.12/35/INTERN dated July 23, 2010 on Guidelines for Coordination Mechanism of Handling Alleged Banking Crimes, defines banking crime as a criminal offense that fulfills the elements as referred to in Article 46 to Article 50A of the Banking Law (Law No. 7 of 1992 Jo. Law No. 10 of 1998 on Banking) jo. Article 59 through Article 66 of Law Number 21 of 2008 on Sharia Banking (Sharia Banking Law).

The elements that must be present in a Banking crime include the subject (perpetrator) who commits a criminal act, and evidence of a criminal act, both those who commit criminal acts, as well as those who are negative, namely not doing actions that should be mandatory, which is detrimental to Banking. The occurrence of banking crimes is generally caused by the weakness of regulations in the field of banking. In addition, it is also caused by weak supervision in the field of banking, so that it is easily utilized by banking actors who have malicious intentions, such as in the case of misuse of Bank Indonesia Liquidation Assistance, which has harmed state finances by tens of trillions of rupiah. Thus, the definition of banking crime is very broad, which includes chiral traffic activities, banking licensing, banking secrets, crimes committed by directors, management, and those committed by employees or employees of the Bank, for example in lending, fraud, embezzlement by employees, forgery, clearing, foreign exchange games, and so on.[3]

According to Edward Ross, criminals are *criminaloids*, namely those who commit criminal acts in carrying out their duties / jobs, but their crimes are not yet known to the public.

The perpetrators of banking crimes have peculiarities that distinguish them from *conventional crimes*. Banking criminals have moral capacity that is different from *conventional criminals*. Banking crime perpetrators have more intellectual abilities than conventional crime perpetrators. Banking offenders, in addition to having moral capacity, also have an intelligence and intellectual level that exceeds the average.[4]

Meanwhile, crimes in the field of banking are crimes that are outside the financial sector. Crimes in the field of banking are ordinary crimes whose objects are banking products, such as schiming, ATM break-ins, bank robberies, customer robberies, and other similar crimes. Crimes in the field of banking are all forms of unlawful acts that use banks as a means. Crimes in field of banking are unpredictable in time as well as in banking crimes, crimes in field of banking can occur at any time, whenever there is an opportunity at that time the crime occurs. By understanding the scope of banking crimes on the one hand and crimes in the field of banking on the other, it is hoped that it can provide enlightenment on the differences between banking crimes and crimes in field of banking.

### **Legal Subjects of Banking Crime**

The legal subject of banking crime is the perpetrator of banking crime. If referring to Law Number 7 Year 1992 on Banking, in addition to being committed by banking parties, banking crimes can also be committed by affiliated parties. Furthermore, regarding affiliated parties can be seen in the provisions of Article 1 number 22, which is formulated: "Affiliated Party is:

- a. members of the Board of Commissioners, supervisors, Directors or their proxies, officers, or employees of the Bank;
- b. members of the management, supervisors, managers or their proxies, officials, or employees of the Bank, specifically for Banks in the form of cooperative legal entities in accordance with applicable laws and regulations;
- c. parties providing services to the Bank, including public accountants, appraisers, legal consultants and other consultants;
- d. parties who, according to Bank Indonesia's assessment, participate in influencing the management of the Bank, including shareholders and their families, families of commissioners, families of supervisors, families of Directors, families of management.

The key subject of Banking crime law is not the evil will of the perpetrators, but their insensitive morals. The *criminaloids* are not like street criminals, they are people who have high and honorable positions in society.[5] Whereas in criminal acts in the field of Banking, the subject or perpetrator doesn't have intellectual advantages above the average of normal people, but can be committed by anyone, as long as the act or criminal act can be categorized as an act or act that uses Bank as a means of crime. Whereas in Banking Crimes, the subject of perpetrator is limited to organs or people within the Bank institution itself, such as Bank employees, Bank directors, Bank commissioners, and like.[6]

Banking crime is a form of *white-collar crime*, which is also a crime that uses banks as its target against the criminal law, which is committed either intentionally or unintentionally. Banking crimes are identified as having a relationship with banking institutions, devices and products, causing material and/or immaterial losses to banks, as well as to customers or other third parties. Sanctions against perpetrators of banking crimes are based on the provisions of the Banking Law. Meanwhile, criminal offenses in the field of Banking are subject to sanctions as stipulated in the provisions of Criminal Code (KUHP), such as fraud, embezzlement, and so forth. Banking crimes can also be categorized as crimes that violate Law Number 31 of 1999

as amended by Law Number 20 of 2021 concerning the Eradication of Corruption, as well as the provisions of Law Number 8 of 2010 concerning the Prevention and Eradication of the Crime of Money Laundering (TPPO). Crimes in the field of Banking are closely related to properties that can be observed with naked eye or with head, because they can be traced through the digital footprint of Banking.

### **Investigation Authority for Banking Crimes**

Banking crimes have a distinctive character, which is different from criminal offenses in general, so that their law enforcement also requires methods or methods that are fast, precise and accurate.[7] The distinctive character of banking crime is characterized by its covert nature and is in a closed and complex legal relationship, involving many parties, including banking officials. Banking crimes are related to bank secrecy, so that not everyone, including law enforcement officials, is able to detect it from the beginning, and will even experience difficulties in detecting the occurrence of banking crimes, generally only known after the consequences appear on surface.[8]

To determine whether or not there is a banking crime, an investigation must be conducted, with the emphasis on "searching and gathering evidence". Investigation is the process of searching or collecting evidence after an investigation. The person who searches for evidence of an alleged criminal offense is called an investigator. Meanwhile, Investigation is a series of activities to "seek and find" an "event" that is considered or suspected as a criminal act. [9]

Given the specificity of the character of banking crimes, at the investigation level, investigators need special knowledge, skills, and experience in the field of banking. At least the investigator has sufficient knowledge and ability of banking data documents, both conventional and digital/electronic data, information systems, and devices used in banking operations. Because Investigation is the initial stage of law enforcement in the criminal justice system, the inability of investigators to present good skills, can cause failure in law enforcement of banking crimes.[10]

OJK's authority to conduct investigations is regulated in Article 49 paragraph (1) of Law Number 21 of 2011 concerning the Financial Services Authority (UU-OJK), which is formulated: "In addition to the Investigating Officers of the Indonesian National Police, certain Civil Servants whose scope of duties and responsibilities include supervision of the financial services sector within the Financial Services Authority, are given special authority as investigators as referred to in the Criminal Procedure Code."

The provisions of the article are further elaborated in Article 9 point c of OJK Regulation No.22/OJK.01/2015, which authorizes OJK to "conduct supervision, examination, investigation, consumer protection, and other actions against Financial Services Institutions, actors, and/or supporters of financial services activities as referred to in laws and regulations in the financial services sector". In its development, OJK's investigation authority in Law No. 21 of 2011 concerning the Financial Services Authority jo. OJK Regulation No. 22/OJK.01/2015, was felt to be less than optimal in preventing and overcoming criminal acts in financial institutions, then Law Number 4 of 2003 concerning Strengthening and Development of the Financial Sector (UU-PPSK) was issued.

The enactment of Law-PPSK has consequences, especially related to be regulation of authority investigation, which needs to be adjusted to various regulations in the financial services sector. Because the authority of investigation, previously involved several institutions such as the Attorney General's Office, the Police, and also the Corruption Eradication

Commission (KPK), but the enactment of PPSK Law is feared that there will be a tug of authority between the Police Investigator and the OJK Investigator in investigating banking crimes. This can be seen in the provisions by Article 1 paragraph (1), Article 48 paragraph (1) and Article 49 paragraph (5) of Law-PPSK. The possibility of a conflict of authority can be seen in the provisions by Article 49 paragraph (5) of Law-PPSK, which is formulated as follows: Investigation of criminal offenses in financial services sector may only be conducted by investigators of the Financial Services Authority.

The provisions of Article 49 paragraph (5) of the Law on Financial Services may cause norm conflicts with the provisions in the Criminal Procedure Code, especially related to the phrase "can only be carried out by the Financial Services Authority". Thus, the provisions of Article 49 (5) of the PPSK Law reduce the constitutional authority of Police Investigators, which is attributively granted by Article 30 paragraph (4) of the 1945 Constitution. The phrase "can only" related to authority - investigate banking crimes by OJK, can cause separate legal problems within the institution of Indonesian National Police. The issue of reduction by authority Police Investigators in conducting investigations into criminal acts within financial institutions, especially banking crimes, can be justified. Article 49 paragraph (5) of the PPSK Law, which only gives the authority to investigate banking crimes to OJK, certainly cannot be justified, because the authority of Police Investigator to conduct investigations is a constitutional authority granted by Article 30 paragraph (4) of the 1945 Constitution, which is formulated: "The National Police of the Republic Indonesia as a state instrument that maintains security and public order is tasked with protecting, protecting, serving the community, and enforcing the law."

The sentence enforcing the law in Article 30 paragraph (4) of the 1945 Constitution of the Republic of Indonesia means that law enforcement includes the authority to investigate all types of criminal acts, including the investigation of banking crimes. In addition, the reduction of the authority of Police Investigator is also not in accordance with the attributive authority of the Police Investigator regulated in the Criminal Procedure Code. Theoretically, the enactment of PPSK Law which authorizes the OJK as the sole investigator and reduces authority of investigators may be based on the principle of preference *lex specialis derogat legi generalis*, but it must be understood that juridically constitutionally based on Article 30 paragraph (4) the 1945 Constitution of Republic Indonesia, criminal investigations in the context of law enforcement are the authority of Police Investigators.

The philosophical problem is related to efforts to eradicate banking crimes that are very detrimental, and can disrupt the stability of the country's economy, whether the existence of a single investigator of banking crimes by the OJK can realize objectives to be achieved, especially in realizing legal certainty that law enforcement of banking crimes can be effective and ensure that the perpetrators can be prosecuted and tried with evidence from the results of investigations by OJK. In addition, at the legal structure level, the enactment of PPSK Law will change the structure of the Police institution down to the regional level. Based on National Police Chief Regulation No. 22/2010 on the Organizational Structure and Working Procedures at the Regional Police Level.

The provisions of the article are the basis for the formation of the Directorate in the Police institution, which with the issuance of Law-PPSK becomes uncertain whether it will be maintained or merged with other institutions, considering that Law-PPSK gives authority to OJK as the sole investigator.

Concerns related to the authority of the OJK as the sole investigator in banking crimes, Article 49 paragraph (5) of Law-PPSK was eventually subjected to a judicial review to the Constitutional Court. Against the judicial review of the Law-PPSK, then on December 21, 2023, the Constitutional Court through Decision Number 59/PUU-XX/2023, in its dictum decided to delete the phrase "can only" in Article 8 Number 21 of Article 49 paragraph (5) of the Law-PPSK. Thus, the Constitutional Court Decision abolished the OJK as sole investigator authorized to investigate banking crimes. The Constitutional Court's decision then restores the authority of Police Investigator to investigate banking crimes as before the enactment of Law-PPSK.

### **Police Investigator Certification**

Factually, OJK does have the ability to master material substance of investigations into criminal acts in the financial services sector, including banking crimes. However, it needs to be considered even though OJK is an independent institution authorized to supervise the financial services sector. To maintain neutrality, it should be carried out with Police Investigators and directly under the orders of the Police. The return of the authority of Police investigators in the investigation of banking crimes is in accordance with the constitution (UUD NRI Tahun 1945). To further improve the knowledge and skills of Police Investigators in conducting investigations, special education must be provided to train special skills and expertise in investigating banking crimes, or have competency certification issued by an authorized agency or institution.[11]

### **Conclusion**

The authority to investigate criminal offenses in financial services sector, especially in the banking sector, continues to undergo dynamic changes. All of these efforts are aimed at realizing one estuary towards a better quality of investigation in the financial services sector, especially Banking. Starting from the Police Investigator based on Criminal Procedure Code, then shifting to the OJK Investigator based on the PPP Law which gives full authority to the OJK as the sole Investigator. In the end, based on Constitutional Court Decision No. 59/ PUU-XX /2023, in its dictum canceled the authority of the OJK as sole investigator and returned authority of the Police Investigator in investigating banking crimes, and finally based on, and finally with OJK Regulation No. 22/POJK.01/2015 concerning Investigation of Criminal Acts in the Financial Services Sector. In the end, the authority to investigate banking crimes is carried out by Police investigators, Civil Servant Investigators, and certain employees, who are specifically authorized as investigators as referred to in Criminal Procedure Code, to conduct investigations, including OJK investigators.

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