THE AUTHORITY OF THE FINANCIAL SERVICES AUTHORITY (OJK) IN PUBLISHING INSURANCE REGULATION IN THE PERSPECTIVE OF INSURANCE LAW IN INDONESIA

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Abstract

Legal basis of the formation of the Financial Services Authority (OJK) is based on the Article 34 of the Law No. 3 of 2004 on Bank Indonesia. The legislation process was then approved and endorsed the Law No. 21 of 2011 on the Financial Services Authority (OJK). Article 6 of the law gives the OJK authority to supervise both for bank and non-bank financial institution, including insurance agencies. Article 5 of the Insurance Law, OJK is given a mandate to make a regulation to expand the scope of the insurance business activities in accordance with the needs of the society. One of the businesses is investment-based insurance. Regulations made by OJK must not be contrary to the Insurance Law itself. One issue is found on the draft of the OJK regulation regarding the permissibility of general insurance conducting investment-based insurance business.

Keywords: Financial Service Authority, insurance

Abstrak


Kata kunci: Otoritas Jasa Keuangan, Asuransi
I. Introduction

Insurance arises because human needs. In life and human life is always confronted with something uncertain. Humans expect security on their property, health and welfare are not expecting one any less. But man can only try, but God Almighty who decides everything. Therefore, every human being without exception in this mortal nature always face various risks, which is human nature that shows his helplessness to the Creator.¹

Efforts to give definition to the word insurance can invite lengthy discussions but basically, the definition of insurance can be divided in terms of insurance as an agreement and insurance as a risk transfer mechanism. Subekti said that insurance is an agreement in which the parties pledged guarantees on the part that is guaranteed to receive a sum of money premium in lieu of damages suffered by the parties is guaranteed, as a result of an event that is not yet evident.²

Insurance agreement is the basis for the party at the party promised to do something of value for the insured as the other party upon the occurrence of certain events. The agreement is the basis for one party to take over a risk faced by the other party upon payment of premium rewards.

Insurance is a legal term used in legislation and insurance companies. The term comes from the word "insurance" means insurance or protection of objects of hazards that cause harm.³

So insurance means that all efforts relating to insurance. Article 1 paragraph 1 of Law No. 40 of 2014 on Insurance states that insurance is an agreement between two parties, the insurer and the policyholder, which became the basis for the acceptance of premium by the insurer in exchange for: (a). Reimburse the insured or the policyholder for loss, damage, costs incurred, loss of profits or legal liability to third possible suffered by the insured or the policyholder due to the occurrence of an uncertain event, or (b). Provides payment based on the death of the insured or his payment based on the amount insured by the benefits that have been assigned or are based on the results of fund management.

In the Law No. 14 of 2014 on Insurance, the insured is also called the policyholder previously only known by the insured. Insurance is an institution that serves as a transfer of risk from the insured to the insurer. According to the theory of the transfer of risk (risk transfer theory), the insured realize that there is the danger of wealth and soul. If the danger befall people or property, he will suffer loss or loss of life or disability raganya the business world in carrying out its activities in addressing various risks that may disrupt the continuity of their business.⁴

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¹ A. Junaedy Ganie, *Hukum Asuransi Indonesia*, (Jakarta: Sinar Grafika, 2010), p. 1
² Ibid.
By paying a premium to the insurance company (insurer), since it was the risk is transferred to the insurer.\(^5\) Function other than the transfer of risk, insurance is the payment of damages, in the absence of events that cause harm. In practice it does not always happen danger. This is an opportunity for the insurer to pay the premiums, if at some point actually happening events that cause losses.\(^6\) In the traditional insurance, insurance typically is based on the Commercial code and have long utilized by consumers of non-traditional insurance or so-called modern insurance is insurance with a kind unitlink very popular today, because unitlink is a type of insurance that combines life insurance with investments. A striking characteristic of unit-linked insurance is an element of investment in the insurance. Therefore there has been a paradigm shift insurance as an institution transfer of risk into investment institutions. Basically, insurance is not an investment because main function of the insurance is protection, except insurance as sacrifices made now to avoid the risk of unforeseen future. Investment\(^7\) is an activity placed funds in one or more than one type of asset for a certain period with the hope to earn and or increase the value of investments, while investments or investments in accordance with Article 1 paragraph 1 of Law No. 25 of 2007 is any form of investing activity by both domestic investors and foreign investors to do business in the territory of the Republic of Indonesia. In general, investment or capital investment can be defined as an activity performed by an individual (natural person) and legal (judicial person) in an effort to improve and / or maintain the value of their capital, either in the form of cash (cash money), equipment (equipment), the fixed assets, intellectual property rights, as well as expertise.\(^8\) Currently, there are many products offered by insurance companies in Indonesia, the insurance is no longer only offers life insurance and educational insurance alone (traditional insurance) but has penetrated into investment. On the concept of insurance and investment are two different ones. But we can see Article 5 of the Insurance Law expands the scope of insurance subject to the Financial Service Authority regulation. How the agency carry out the duty associated with the regulation under the law will be examined below.

Institutions that supervise the financial services sector is called the Financial Services Authority (Otoritas Jasa Keuangan, OJK). Law No 21 of 2011 About the Financial Services Authority (FSA Act) basically contains provisions concerning the organization and governance of the agency that has regulatory and supervision authority of the financial services sector. Under the FSA Act, the FSA has the function to organize the overall activities of regulatory systems in the financial services sector. Through Article 5 of the

\(^5\) Muhammad, *Hukum Asuransi Indonesia*, p. 12  
\(^7\) According to Ketut Sendra investment (investment) is a means or a tool to increase the value of the funds that we store in a particular investment instrument to obtain a refund of positive (positive return). Ketut Sendra, *Asuransi Jiwa Unit Link dalam Konsep dan Penerapannya*, (Jakarta: PPM, 2004), p. 9.  
\(^8\) Ana Rokhmatussa’dyah dan Suratman, “Hukum Investasi dan Pasar Modal”, (Jakarta: Sinar Grafika, 2009), p.3.
Law Indonesian FSA applies integrated model between regulation supervision (integration approach), which means it will leave the institutional model of supervision. With the FSA Act in force, entire regulatory and supervisory duty of the financial sector which was divided to Bapepam-LK and Bank Indonesia will converge at the FSA. The FSA authorized the task to regulate and supervise the financial institutions. The insurance business as financial institutions are also under the authority of the FSA to issue the regulation and oversight of insurance agencies. This article examines the authority of FSA under the insurance law.

II. Authority of the Financial Services Authority (FSA) in the Perspective of Law No. 40 on Insurance

FSA was established as an independent agency that oversees financial institutions, both banks and non-banks, such as securities firms, factoring, venture capital, corporate finance, mutual funds, insurance and pension funds and other institutions are doing activities to collect funds. The formation of the FSA can not be separated from the situation in the world economy during the economic crisis in 1997/1998. BI is viewed not optimal in performing supervisory functions. On the other hand, in developed countries, there is a tendency of separation of the functions of banking supervision from the central bank to then be handled exclusively by the financial supervisory agency that is independent, for example, the Financial Services Authority (FSA) in the United Kingdom.

Law No. 40 of 2014 on Insurance is not set explicitly about insurance linked to investment. However, in Article 5 of this law confirms the with authority pf the FSA to expand the scope of the insurance business. Article 5 explains:

1. The scope of the General Insurance Business and Life insurance businesses as referred to in Article 2, paragraph 1 and paragraph 2 as well as the General Insurance Business Life Islamic Insurance Business as referred to in Article 3, paragraph 1 and paragraph 2 can be expanded according to the needs of society.
2. Expansion of the scope of the General Insurance Business, Enterprise Life Insurance, General Insurance Business Sharia and Islamic Life Insurance Enterprises referred to in paragraph 1 may be additional benefits based on the amount of funds management.
3. Further provisions concerning the extension of the scope of the general insurance business, Business Life Insurance, General Insurance Business

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10 Tim Kerjasama Penelitian FEB UGM dan FE UI, "Alternatif Struktur OJK yang Optimum," Kajian Akademik, 23 Agustus 2010, p. 3
Sharia and Islamic Life Insurance Enterprises referred to in paragraph 1 and paragraph 2 stipulated in the Regulation of the Financial Services Authority.

In the Insurance Law, the FSA is authorized to issue regulations related to the expansion of the insurance business including investment-based insurance, according to the needs of society. In OJK Regulation No. 23/POJK.5/2015 (POJK) on Insurance Products and Insurance Products Marketing in Article 1 paragraph 2, explained that The Linked Insurance Products By Investing hereinafter referred PAYDI is an insurance product that is at least provides protection against the risk of death and gives the benefits of which refers to the investment results of the collection of funds specifically set up for a good insurance product that is expressed in units and not units. PAYDI in Article 4 POJK must meet the following criteria:

a) Having proportion of protection against the risk of death and benefits with investment
b) Has a certain insurance period
c) Choose a specific investment strategy.

The concept of insurance-based investments have that only life insurance that can run the investment-based insurance. Inversely proportional to general insurance, life insurance industry has long recognized the investment-based insurance products known as unit-link. In fact, the data of Indonesian Life Insurance Association (AAJI) shows premiums from unit-linked products grew 9%, while traditional products grew only 4.1% to December 2014. However, because the FSA is authorized to expanding the scope of insurance undertakings under Article 5 Insurance law the FSA has issued a draft Regulation No.41/POJK.05/2015 on the Implementation of Enterprise Insurance Company, Insurance Company Islamic Reinsurance Company and Sharia Reinsurance Company. Arrangements regarding the conduct of insurance business is one regulation that is derived from the mandate of Insurance Law. The insurance product can be marketed by a general insurance company in Article 9 paragraph 1 in POJK No. 23/POJK.05/2015 about insurance products and marketing insurance products are insurance products referred to in Article 1 letter a, c, and d.

a) Program that promises protection against one (1) or more types of risks that can be insured arising out of an event which is not bound to reimburse the policyholder, the insured, or the participant for damages, losses, costs incurred, loss of profits, or responsibility law to third parties which may be suffered by the policyholder, the insured, or the participant, or the provision of a guarantee fulfillment of the obligations guaranteed party to another party if the party can not be guaranteed obligations memenihi
b) Program that promises protection against one or more risks associated with the state of one's physical health or deterioration of health condition of an insured person, or

c) Programs that menjanjikan protection against one or more risks by providing reimbursement or payment to the policyholder, the insured, or the participants or other parties who are entitled in the event of an accident. The above is a type of insurance product that can be marketed by general insurers.

While In Article 1 point two POJK above described Insurance Products That Associated With Investments (PAYDI) is an insurance product that is at least provides protection against the risk of death and provide benefits that refers to the investment results of the collection of funds specifically set up for insurance products both stated in the form of units and not units.

Meanwhile, a general insurance company can only organize a general insurance business including health insurance business line and personal accident insurance business lines as defined in Article 2 Draft POJK on the Implementation of the business of insurance. Likewise in Article 3 it is explained that the General Insurance Business Sharia can only organize the General Insurance business, including health insurance business line based on sharia principles and personal accident insurance business lines based on Islamic principles.

Article 4 of the draft POJK regulate the expansion of the scope of the general insurance business, under Article 4 of his which explains that the operations of the insurance company or Takaful company can be expanded according to the needs of the community with the following conditions:

a. General Insurance Company can only expand the scope of business:
   1. PAYDI (insurance based on investment)
   2. The business activities of fee-based services and or
   3. Suretyship.

b. Islamic Insurance Company can only expand the scope of business:
   1. PAYDI
   2. The business activities of fee-based services

With the FSA's draft regulation issued, the insurance activities based investment has been allowed only for life insurance, although it is not strictly regulated within the Insurance Law, investment-based insurance is now permissible for general insurance. Life insurance with public insurance as a risk and very different kind of loss. Rules that allow the general insurance companies to sell insurance-based investment products is very new that has never been set before. Therefore it is necessary to see how the concept of risk in general insurance and life insurance, whether it is out of the concept and principles of insurance. This is because the concepts of insurance and investment are two very different things.

Dumoly F Parde, deputy commissioner of non-bank financial industry, Supervisor II of FSA said the unit linked products scheme of general insurance company will apply a somewhat different with the existing life insurance. One of the difference is, the investment return is can be offered by the general insurance companies as the discount for the premium renewal for the policyholder, if the policyholder does not have a record of claim for certain
To give illustration, he pointed in the sale of motor vehicle insurance policy. For example, the value of car insurance for a year reached 500 million rupiah, a customer offered to pay the extra premium that is an investment of 150 million rupiah. Then, the total investment gained from the paid premium can be used as the premium renewal discount, so that the customers do not have to pay the renewal if they do not have record of claim.

This is different with the unit-link scheme in the life insurance companies. In life insurance, policyholder would receive the benefit without have to pay the claim costs and other expense of the investment management company if the policyholder dies. So, if there is no direct investment claim, it is favorable for the renewal premium of the insurance company. Thus, general insurance will be varied and matching the needs of the consumers. The investment instruments that are allowed to be managed with the product is in accordance with the general provisions of the investment companies in the applicable regulation.

FSA plans mentioned above should be linked with the principle of indemnity under the insurance agreement. Therefore the following will be describe the concept of indemnity, whether the FSA plans to grant permission and issue the general insurance regulation which allows investment-based insurance that is not contradict with the principle.

1. The Indemnity Principle in Insurance Agreement

God endowed human beings various advantages. Therefore man as a creature that has properties over other creatures seeking efforts in order to overcome the unsafe earlier. Man with his intelct to make an effort to manggulangi insecurities earlier so that she feels safe. With his power of the human being trying to move from uncertainty becomes certainty, so that he can always avoid or overcome the risks, both individually and together. Therefore, the efforts to deal with uncertainty is a character of the risk of causing harm to humans. Human nature would avoid or divert the risk that is not sure when it happened. Man's efforts to shift risk to other parties in the insurance agreement resulted in several programs that are the setting has been no definite rules as a

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14 In KUHD there are two (2) ways of arranging insurance, general and specific nature. The general regulation contained in the book I Babb 9 Article 246- Article 286 Commercial code that applies to all types of insurance, which is set in KUHD and outside KUHD. A special regulation contained in Book I Chapter 10 Article 287 Articles 308 to businesses and Book II, Chapter 9 and Chapter 10 Article 592. KUHD priority setting in terms of civil cases which is based on an agreement between the insured and the insurer. Such agreements give rise to reciprocal rights and obligations. as a special agreement, the insurance is made in writing in the form of a deed called an insurance policy. Insurance arrangements in KUHD covers the
basis the implementation of various programs such as insurance. Insurance is growing as more and more various risks encountered in many aspects of life. One effort to overcome that risk is insurance.

Risk is uncertainty or uncertainly which may give rise to damages. Therefore the need for insurance services increasingly felt by both individuals and businesses. Insurance is a financial tool in the governance of domestic life, both on the underlying risk as the risk of death or risk to property. Likewise, in the business world in carrying out its activities in addressing various risks that may disrupt the continuity of their business.

In view of economics, insurance is a method to reduce the risk by transferring and combining the uncertainty over their financial loss (financial). Insurance or have stated its understanding that raw and clear as mentioned in the Indonesian Commercial Code (hereinafter referred to KUHD). Article 246, namely: "Insurance or coverage is an agreement by which an undertaking is binding to an insured to receive a premium to provide compensation for him because between the insurer and the insured which bind indemnify agreed at the time of closing of the agreement in the event of loss, damage or loss of expected profit, which may be suffered because of an event does not necessarily ". Article 246 KUHD implies the principle of indemnity.

The principle of indemnity is actually noticeable in Article 246 of the Commercial Code. Targets to be achieved is to create a balance between the risk transferred to the insurer with the losses suffered by the insured. If the insured is expecting more than that, then he will be faced with a civil law that prohibits unlawfully enrich themselves or to enrich themselves without rights.

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15 Human life is increasingly risky, the concept of risk has become very important for the scientific investigation of the social sciences, and insurance is an important means of coping with uncertainty. Insurance project a future configuration of space and time on the basis of the past. It is socialized in a capitalist society that defines the insurance is a form of alienation in which the unexpected losses socialized in this capitalist society. Mike Neary and Graham Taylor, From the Law of Insurance to the Law of Lottery: An Exploration of the Changing Composition of the British State, "Capital & Class," Vol. 22, No. 2 (1998).

16 A. Abbas Salim, Dasar-dasar Asuransi, (Jakarta: Raja Grafindo Persada, 1995), hlm 3

17 To divert a substantial risk that we can not solve yourself by distributing/sharing of risk. This happens when: -Tertanggung, Implemented because it does not always come true at the same time so as to enable a person's risk is shared. -Risk That diperalihkan very large and unable to bear alone. Therefore there is risk sharing with others (reinsurance)Which is also happening is that distribution or dissemination of risk with herverzekering (Insurers account for tangguing accountable for acceptable risk to another insurer). Which is also happening is that distribution or dissemination of risk with het verzekering (Insurers account for tangguing accountable for acceptable risk to another insurer).

18 Herman Darmawi, Manajemen Asuransi, (Jakarta: Bumi Aksara, 2000), p. 1

19 Herman Darmawi, Manajemen Risiko, (Jakarta: Bumi Aksara, 2002), p2


21 Hartono, Hukum Asuransi, p. 99.
The principle of indemnity is the first principle of the insurance agreement, because it is the principle that underlies the mechanism of action and gives direction from the insurance agreement itself. The main objective of the insurance agreement and specific is to provide an indemnity to the insured by the insurer. Definition of damages it may not cause the financial position of the insured person becomes more advantaged position before suffering a loss. So, is limited to the original position / starting position, meaning just return to the starting position.22

In Commercial Code, the interest is regulated in two articles, namely Article 250 and Article 268. Article 250 stated that: "if anyone has entered into an insurance for yourself, or if a person who has held an insurance for him, at the time of holding the insured does not have an interest in the goods insured that the insurer is not required to provide compensation. "Article 268:" an insured can about any interest that may be assessed by money, can be threatened by something hazard, and not excluded by law. "So in essence, every interest that can be insured, whether interest is immaterial or interests that are right, that they meet the requirements demanded by Article 268 mentioned above, namely that those interests can be measured by money, can be threatened danger and not excluded by law.

The principle of indemnity may be called the principle of balanced compensation, where the amount of the indemnity paid by the Insurer must be balanced with the real losses suffered by the insured. With this principle means the insured can not replace more than the losses suffered, because the insured are prohibited from enriching themselves through insurance.

In general insurance, there are limitations and other types of damages (lost and limitation upon payment) should be given compensation, limits the restrictions are: 23

First, the actual cash value of property. Replacement given to someone based on the actual value (actual) over the actual losses that occur on the property of a person. The insurance company will reimburse only the actual value (actual) over the actual losses that occur on the property of a person. The insurance company would only replace the real value (value). Second, the cost of repair / replacement cost. Based on the losses incurred by replacing direct improvement by not providing cash replacement, or replace with similar goods and the same capacity. For motor vehicle insurance, such as a car accident that damaged the bumper and dented, the insurer simply replace it with a new bumper.

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22 This indemnity principle is a basic foundation in fact contains two aspects, namely: 1. The first aspect is related to the purpose of the treaty, should be addressed to damages, which should not be directed that the insured person for the payment of compensation would clearly occupy a more favorable position. So, if there is a clause which is contrary to the purpose of this led to the cancellation of the agreement.2. The second aspect is related to the implementation of the insurance agreement, as a whole are legitimate. In whole or in part must not conflict with the first aspect. This is very important because the goals to be achieved by the implementation of insurance agreements must meet certain conditions, namely that of the insured person for redress can not be having a more favorable financial position. Ibid, p. 98

23 Ibid.
2. Indemnity Principle In Takaful (Syariah) Insurance

In Islamic insurance indemnity principle also applies in determining the standard indemnity (kafalah), if you see the method indemnity contained in conventional systems, this method is not suitable for use in the Takaful if the expected goal is to provide compensation based on the amount of losses incurred. Kafalah or Dhaman which is the cornerstone of redress in the law of jurisprudence establishes that compensation must be in accordance with the existing loss without deducting or exceeded its value. Unlike indemnity, where applicable principle does not meet the standards of compensation as expected by kafalah (Dhaman). For example, for a maximum of coverage, payment of compensation given by the insurer is less than the amount of losses incurred. The applicable provisions of a claim which the party misfortune befalls must also bear part of the losses, such as loading at their own risk (of claim). This fee also applies to all types of losses that occur, whether it was the fault of the insured person himself or for a third party. And if losses occur because it is caused by the misconduct or intentional element of the other party which is outside the authority of the insured, such as robbery, theft and the elements of intent from a third party should have been insured will receive compensation (kafalah) without any risk for him.

In Takaful rules were burdensome insured in receipt of compensation as those in conventional insurance should be eliminated, given the purpose of the compensation is shut beneficiaries lost without burdening third parties affected communities, especially against loss or accident outside the purview of the insured. With increase the amount of premiums collected over the years, increase profits from the company, and decreasing the ratio of claims payments, Islamic insurance companies can provide relief to participants / insured who can risk as a form of ta’awun.

One thing that is very encouraging FSA authorized regulation very spacious by law either by the FSA Act itself or by the Insurance Act. However, in exercising authority according to the authors of the FSA should provide juridical and philosophical consideration about the rules being issued.

III. Conclusion

Legislation in Indonesia provides a very broad powers to the Financial Services Authority (FSA). One of the authority of the FSA is to the insurance agency, which in the Law No. 40 of 2014 granted the authority to expand the scope of the insurance business. Insurance products allow for investment in Article 5 of Law Insurance though insurance and investment are two different concepts. The authority granted FSA legislation so extensive, both in terms of

setting tasks and stewardship. Naturally, the FSA probe more fully the issue of insurance principles, in carrying out the task of setting. One matter is about the design of the FSA Regulations concerning the permissibility of general insurance conduct business investment-based insurance. General insurance or life insurance applies the principle of indemnity (compensation are balanced). While insurance policyholder investment means investing, investment for profit and enrich themselves, which is contrary to the principle of insurance. Legislation provides very broad authority to the FSA either in regulation or in the task of supervisory duties.
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