

THE CORPORATE SPIN-OFF: An Examination of Islamic Banking Legal and Regulatory Framework

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Abstract

This paper aims to instigate the implementation of Article 68 of the Islamic Banking Act, which obliges Islamic divisions to be separated from their parent banks. This study attempted to reveal a legal solution so that the obligations can be turned into a corporate action. The argument presented by a critical review approach based on a literature review using secondary data. The solution still considers spin-offs a necessity, not a mandate. It is supposed to be considered a corporate action that its implemented based on readiness so the article needs to be amended. This paper proposes changes to the article on spin-offs for the development of Islamic Banking in Indonesia with practical benefits. Alternative changes can be completed in three ways: first, by issuing Financial Services Authority Regulation (FSAR), which makes the spin-off a corporate action. This method is unconstitutional because FSAR is structurally under the Constitution. The second alternative is done by submitting a judicial review of Article 68 to the Constitutional Court. Finally, the third is by enacting the omnibus law of Islamic economics. Those three options have both advantages and disadvantages. Thus, it is necessary to further find out which solution is most prospective for advancing Islamic banking.

Artikel ini bertujuan untuk mendorong penerapan Pasal 68 Undang-Undang Perbankan Syariah yang mewajibkan divisi syariah dipisahkan dari bank induknya. Kajian ini mencoba mengungkap solusi hukum agar kewajiban tersebut dapat berubah menjadi aksi korporasi. Argumen yang disajikan menggunakan pendekatan

tinjauan kritis berdasarkan tinjauan literatur dengan menggunakan data sekunder. Solusinya tetap menganggap spin off sebagai kebutuhan, bukan sebagai mandat. Hal ini seharusnya dianggap sebagai corporate action yang pelaksanaannya berdasarkan kesiapan sehingga pasal tersebut perlu diubah. Makalah ini mengusulkan perubahan pasal spin-off untuk perkembangan perbankan syariah di Indonesia dengan manfaat praktis. Alternatif perubahan bisa dilakukan dengan tiga cara, pertama dengan menerbitkan Peraturan Otoritas Jasa Keuangan (POJK) yang menjadikan spin off sebagai corporate action. Cara ini inkonstitusional karena POJK secara struktural berada di bawah konstitusi. Alternatif kedua dilakukan dengan mengajukan uji materi pasal 68 ke Mahkamah Konstitusi. Terakhir, yang ketiga adalah dengan pengundangan omnibus law ekonomi syariah. Ketiga pilihan tersebut memiliki kelebihan dan kekurangan. Untuk itu perlu dikaji lebih lanjut solusi mana yang paling prospektif untuk memajukan perbankan syariah.

Keywords: *Financial Economics, Law and Economics, Business Law*

Introduction

The banking system in the Islamic economy is based on the concept of sharing both profits and losses. The general principle is that anyone who wishes to obtain profits from their savings must also be willing to take risks. Banks will also share the company's losses if they expect a return on their capital.¹ The development of Sharia banking in Indonesia itself cannot be separated from the issuance of the Sharia (Islamic) banking law, namely Law Number 21 of 2008.² 3 The issuance of the law is a reasonably uphill struggle, especially in the discussion in the legislative body.

Some studies are relevant to this article, especially regarding spin-offs. A study conducted in 2019 entitled Analysis of Opportunities and Challenges in the Implementation of the Obligation to Spin Off Sharia Business Units into Sharia Commercial Banks (Case Study of PT. BNI Syariah) shows that the implementation of Spin-Off at Bank BNI Syariah is influenced by Spin-Off, which is an alternative strategy in facing quite tight business developments.⁴ Another research conducted in 2022 entitled Juridical Review of the Readiness of Spin-

1 Ahmad Supriyadi, "Penerapan Berbagi Keuntungan Dan Kerugian Dalam Pembia Aan Murabahah Di Bank S Ariah Indonesia," *Jurnal Pembaharuan Hukum* 4, no. 1 (2017): 42, <https://doi.org/10.26532/jph.v4i1.1658>.

2 Moh. Indra Bangsawan, "Eksistensi Ekonomi Islam (Studi Tentang Perkembangan Perbankan Syariah Di Indonesia)," *Law and Justice* 2, no. 1 (2017): 24–34, <https://doi.org/10.23917/laj.v2i1.4334>.

3 Nur Melinda Lestari, *Sistem Pembiayaan Bank Syariah : Berdasarkan UU No. 21 Tahun 2008, Jakarta Selatan* (Jakarta Selatan: Grafindo Books Media, 2015).

4 Ari Andika Putra, Ahmad Mulyadi Qosim, and Hilman Hakiem, "Analisi Peluang Dan Tantangan Pelaksanaan Kewajiban Spin-Off Unit Usaha Syariah Menjadi Bank Umum Syariah (Studi Kasus PT . BNI Syariah)," *Al Amwal Jurnal Hukum Ekonomi Syariah* 9, no. 1 (2019): 1–12.

Off Obligations for Sharia Business Units to Become Islamic Commercial Banks (ICB) explains the results of the research in the form of problems that arise in facing the spin-off period, where not a few SBUs are overwhelmed in preparing capital, leaving them weaker after separation.⁵ While this study tries to examine spin-off by providing 3 (three) options for changing the article governing the Spin-Off policy, the first is to issue an FSAR which makes spin-off a corporate action, the second alternative is to conduct a material test on Article 68 to the Constitutional Court of the Republic of Indonesia, and the last way is to enact an omnibus law based on Islamic economics.

In the law, Article 68 which regulates spin-offs is considered a phenomenal article since it is predicted to bring the Islamic banking industry in Indonesia even further in the future. A spin-off is a phenomenon of corporate action performed by several banks in Indonesia that have Sharia Business Units (SBUs). According to Law Number 21 of 2008 concerning Sharia (Islamic) Banking, the spin-off is the separation of business from one bank into two or more business entities in accordance with the provisions of the legislation.⁶ The spin-off, as opposed to a merger, is one of the restructuring methods. A merger is the merging of two or more business entities into one business entity. If the merger is commonly done to strengthen the company in terms of capital and so on, the spin-off is performed to make it easier for new legal entities (the result of separation) to be more agile in conducting business and expanding. It is common because staying under the same legal entity will usually slow down the unit's development rate or even the legal entity that covers it comprehensively.⁷

The conditions for the implementation of the SBUs spin-off policy will be implemented in 2023. With the short deadline for the spin-off, many SBUs have not yet reached 50% of their capital. Thus, according to the provisions, they have not been able to complete the spin-off, but they are approaching the deadline.⁸ Therefore, there is a discourse to make changes to Article 68.⁹ The obligation to

5 Wiwin Muchtar Wiyon and Iskatinah, "Tinjauan Yuridis Terhadap Kesiapan Kewajiban Spin Off Bagi Unit Usaha Syariah (UUS) Menjadi Bank Umum Syariah (BUS)," *Wijayakusuma Law Review* 4, no. 2 (2022): 43–50.

6 Yunita Wulandari, A'yun Nadhira, and Mohammad Ghozali, "Sejarah Pembangunan Hukum Perbankan Syariah Di Indonesia," *Jurnal Masharif Al-Syariah: Jurnal Ekonomi Dan Perbankan Syariah* 4, no. 1 (2019): 69–76, <https://doi.org/10.25123/vej.3629>.

7 M. Nur Rianto Al Arif, M. Arief Mufraini, and M. Agung Prabowo, "Market Structure, Spin-Off, and Efficiency: Evidence from Indonesian Islamic Banking Industry," *Emerging Markets Finance and Trade* 56, no. 2 (2020): 329–37, <https://doi.org/10.1080/1540496X.2018.1553162>.

8 Muhammad Ilham Rysaldi, Budi Santoso, and Latar Belakang Masalah, "Konsep Perbankan Syariah Pasca Spin Off: Perspektif Indonesia" 15 (2022): 459–74.

9 Wardah Yuspin, Absori, and Yulian Dwi Nurwanti, "Islamic Banking Structure Post Spin-off Policy:

carry out a spin-off remains enclosed to the SBUs. However, it is not a mandate of the law, but rather a corporate action where the readiness is submitted to each SBU, but one strict requirement of each SBU is to make a complete and well-defined research roadmap on when to perform the spin-off.

Every policy mentioned in a statutory regulation continuously generates two opposing sides. A similar issue occurred with the policy regarding the separation of Sharia business units ordered by law. This policy regarding the spin-off is also no exception. Many Islamic financial institutions have SBU but are unwilling to spin off their units for various reasons.¹⁰

There is high potential for an SBU that is not ready to do a spin-off because, as we know, all profits of the so-called sharia business unit of a conventional financial institution will surely be deposited in the parent bank, resulting in the unit not being able to meet the requirements regarding the minimum capital of 50%. Hence, the minimum requirements for the spin-off carried out are not achieved. As a consequence, the spin-off cannot be performed. Therefore, the urgency of this research is to offer a solution on how to change the editorial in Article 68 and make the spin-off a corporate action.¹¹

Research Methods

The studies in the list are based on the idea that the mandate of Article 68 of Law Number 21 of 2008 on the maximum banking SBU spin-off obligation in 2023 is less relevant to realizing an efficient, competitive goal, and sustainable sharia banking industry. Furthermore, the analyses have led to the following results:

- a. Field data analysis shows that a well-managed SBU is relatively more efficient than an Islamic Commercial Bank (ICB) based on most banking financial ratio assessments.
- b. Business analysis indicates that:
 - 1) The spin-off strategy is not the only industrial development solution;
 - 2) From 9 to 12 SBUs, out of 20 SBUs in total, it is estimated that they are not ready to face the spin-off in 2023.
- c. The Sharia analysis concludes that Sharia compliance is maintained in the institutional status of both ICB and SBU.

Indonesian Perspective,” *International Journal of Innovation, Creativity and Change* 12, no. 2 (2020): 374–91.

10 Khotibul Umam and Veri Antoni, *Corporate Action Pembentukan Bank Syariah: Akuisisi, Konversi, Dan Spin-Off*, Gajah Mada University Press Yogyakarta, 2018.

11 Im Hilman, “Sharia Business Unit Spin-off: Strategic Development Model of Sharia Banking in Indonesia,” *International Journal of Islamic Banking and Finance Research* 2, no. 2 (2018): 1–15, <https://doi.org/10.46281/ijibfr.v2i2.43>.

- d. The legal analysis reveals that policies that are considered counter-spin-off but positive for the banking industry have been and will be issued by the regulator (e.g., banking consolidation and the initiation of increasing bank core capital).
- e. The academic perspective shows that the spin-off obligation contrasts with the trend of increasing market power in the national banking industry.

Based on the aforementioned review of the background, this research aims to investigate how the proper legal action is taken to change the concept of the mandate of Article 68 of the Islamic Banking Law into corporate action.

Discussion

Development of Sharia Bank Regulations in Indonesia

The development of the Islamic banking system in Indonesia is conducted within the framework of the dual banking system of the Indonesian Banking Architecture (IBA) to present an increasingly complete alternative to banking services for the Indonesian people. The characteristics of the Sharia banking system operating based on the principle of profit-sharing provide an alternative banking system that is mutually beneficial for the community and banks, as well as highlight aspects of fairness in transactions, ethical investment, promote the values of togetherness and brotherhood in production, and avoid speculative activities in financial transactions.¹² Bank Muamalat Indonesia (BMI) is the first Islamic bank in Indonesia established before the enactment of Law Number 7 of 1992, which allows the establishment of a bank that entirely conducts activities based on Sharia principles. The existence of BMI is further reinforced by the constitution with the issuance of Law Number 7 of 1992 on Banking, where profit-sharing banking is accommodated in government regulations. In response to this article, the government, on October 30, 1992, issued Government Regulation Number 72 of 1992 on Banks based on the profit-sharing principle.¹³

In Law Number 10 of 1998 concerning amendments to Law Number 7 of 1992 on Banking, several changes provide more significant opportunities for the development of Islamic banking to provide a more robust legal basis for the development of Islamic banking in Indonesia. These regulations provide ample

12 Ida Hanifah, "The Role of Otoritas Jasa Keuangan (Financial Services Authority) in Supervising Sharia Banking Products in Indonesia," *Budapest International Research and Critics in Linguistics and Education (BirLE) Journal* 2, no. 4 (2019): 375–84, <https://doi.org/10.33258/birle.v2i4.500>.

13 Amir Baktiar et al., "Murabahah Implementation in Islamic Bank (Study at Bank Muamalat Kendari Branch)," *IOSR Journal of Economics and Finance* 8, no. 5 (2017): 13–27, <https://doi.org/10.9790/5933-0805011327>.

opportunity to develop a Sharia banking network, among others, through permits to open Sharia Branch Offices (SBOs) by conventional banks. In other words, commercial banks can operate two business activities, both conventionally and based on Sharia principles.¹⁴ On July 16, 2008, Law Number 21 of 2008 concerning Islamic Banking was ratified, providing a legal basis for the national Islamic banking industry and is expected to encourage the development of Islamic banks.

Spin-off: The Ultimate Strategy of Sharia Banking

Article 1 Number 32 of the Sharia Banking Law defines spin-off as “the separation of the business of one bank into two or more corporate banks by the provisions of the legislation”. The Law Number 40 of 2007 concerning Limited Liability Companies defines spin-off as legal action taken by the Company to separate the business, which results in the transfer of all assets and liabilities of the company by law to 2 (two) or more companies or a part of the assets and liabilities of the company is transferred due to 1 (one), or more companies (Article 1 point 12). This Limited Liability Company Law is referred to because the legal entity form of a Sharia bank is a Limited Liability Company, so it has close relevance. Based on the above definition, it can be understood simply that the spin-off of a Conventional Commercial Bank SBU is the process of separating the SBU from its parent bank into a Sharia Commercial Bank with its own independent legal entity.¹⁵

The instructions for the spin-off in Article 68 of the Islamic banking law are regulated explicitly in the transitional provisions. Most Indonesian laws have transitional provisions, meaning “if or when needed.” This definition implies that not all laws have Transitional Rules and only specific laws are necessary to prevent legal loopholes due to changes in statutory provisions. Transitional provisions are generally placed either established or separated in closing provisions.

Article 68 of the law regulates transitional provisions, meaning that this article attempts to provide legal protection for the banking industry by providing a transition period of 15 years from the stipulation of the banking law, and the provision will be enforced in 2023. The SBU spin-off mechanism has been regulated explicitly in Bank Indonesia Regulation (BIR) Number 11/01/PBI/2009 (see Chapter IX Articles 40-54). It should be noted that BIR No. 11/10/PBI/2009

¹⁴ Andrew Shandy Utama, “History and Development of Islamic Banking Regulations in the National Legal System of Indonesia,” *Al-Adalah* 15, no. 1 (2019): 37, <https://doi.org/10.24042/adalah.v15i1.2446>.

¹⁵ Wardah Yuspin and Kelik Wardiono, “Islamic Banking Trajectories of Indonesia: Dealing with the Present and Shaping the Future,” *International Journal of Economic Research* 14, no. 16 (2017): 29–42.

concerning Sharia Business Units was amended by BIR No. 15/14/PBI/2013 concerning Amendments to Bank Indonesia Regulation No. 11/10/PBI/2009 concerning Sharia Business Units, but the editorial of several articles is still maintained as previously.

According to Article 41 of PBI No 15/14/PBI/2013, there are two ways to spin off the SBU from Conventional Commercial Bank (CCB): first, by establishing a new Sharia Commercial Bank (SCB); second, by transferring the rights and obligations of the SBU to the existing ICB. An SBU spin-off with the Establishment of a BUS can only be performed with the permission of Bank Indonesia (now the Financial Services Authority). Paid-up capital is at least five hundred billion rupiahs (Rp 500,000,000). If the paid-up capital is insufficient, the addition can be made in cash and/or land and buildings used to operate the separated SBU. The paid-up capital of the BUS resulting from the spin-off must be increased to at least one trillion rupiahs (1,000,000,000,000.00) no later than 10 (ten) years after the ICB business license is granted (see Article 45). The issuance of a permit for the establishment of an SBU resulting from the spin-off is conducted in 2 (two) stages: approval in principle, namely approval to prepare for the establishment of ICB resulting from the spin-off; and business license which is granted after the ICB resulting from the spin-off is ready to perform operational activities (Article 46). It is essential to note that if the principle license has been granted to the ICB, but within six months after the principle permit has been granted, the CCB has not applied for an ICB business license resulting from the spin-off, then the principle approval that has been granted is invalid (Article 48). Therefore, CCB must prepare all the requirements to the maximum extent possible.¹⁶

The second method of spin-off, namely the spin-off of SBU by Transfer of Rights and Obligations to ICB, can only be conducted with the approval of Bank Indonesia (now the Financial Services Authority). If the transfer plan is approved, the CCB that owns the SBU is obliged to announce it in the national newspaper no later than 10 (ten) days and transfer the rights and obligations of the SBU to the ICB no later than 30 (thirty) days after the date of approval for the transfer. If the transfer of SBU rights and obligations to the BUS receiving the spin-off has not been conducted within 30 days, the approval given will be reviewed again. Then, the spin-off recipients are also required to report their financial condition after receiving the transfer of SBU rights and obligations no later than 10 (ten) days after the implementation date (see Articles 52 and 53). It is significant to

¹⁶ Hilman, "Sharia Business Unit Spin-off: Strategic Development Model of Sharia Banking in Indonesia."

note that the spin-off of SBU from CCB by transferring the rights and obligations of SBU to an existing ICB can only be done to ICB, which has an ownership relationship with CCB that owns SBU (see Article 41).

If the Sharia Business Unit still exists, the conventional bank, which is the parent bank, must combine both long-term and short-term business methods to overcome the spin-off of the Islamic unit. The obligation to conduct a spin-off and the existence of sanctions are deemed appropriate because conventional banks will be forced to set aside capital, prepare qualified and trained personnel, and build adequate infrastructure for separation.

According to legal drafting, Article 68 is positioned as a transitional provision, which means that the application of the requirements in the article is uncertain. Provisions are given for several periods for the Islamic banking industry to prepare for the spin-off and the imposition of sanctions that will be imposed if the spin-off is not applied as a standard approach to the law. A solid power to be enforced must be obeyed, and the law must have sanctions. Over time, this article compels conventional banks with their Sharia units to be more serious in preparing for the separation of Sharia units as mandated by the Islamic Banking Law.

Conventional banks sometimes reject the spin-off plan for internal reasons. Banking infrastructure can also lead to problems because if it is still in the form of a Sharia unit, it will still be dependent on and use the same technology as the parent bank. Meanwhile, if a spin-off is completed, it is necessary to separate the technology from its parent. Moreover, if the Sharia unit has conducted a spin-off, transactions with the parent bank will be more complicated. Efficiency is also a reason for the parent bank not to separate itself from its Sharia business unit because the spin-off will require a lot of new human resources, such as permanent officers, treasurer officers, financial audit officers, risk assessment officers, and the board of directors who are in positions before the spin-off that could still be held by conventional banking officers as dual posts. For this reason, some conventional banks are still reluctant to release their SBU.

Since the establishment of Islamic Banking institutions through the acquisition, conversion, and spin-off process started in 2008, the evaluation of whether the process has brought progress or obstacles to Islamic banking is still ongoing. This analysis will primarily discuss the law that requires an SBU spin-off from the heir's parent bank and the extent to which the law is appropriate to implement in the current conditions of Indonesian Islamic Banking.

Analyzed from the formal legal aspect, the implementation of the spin-off has complied with the Indonesian legal and regulatory framework. When a conventional bank intends to build a branch in the form of an Islamic bank, there must be either understanding, change, or spin-off. It must be official and meet the demands of regulatory requirements by Bank Indonesia, from the planning of establishing a business and permit to open banking until the opening of an Islamic bank.

In addition, Zulfikar Bagus Pambuko also conducted a study to analyze the impact of the spin-off policy on the efficiency level of Islamic banking in Indonesia in the 2008-2018 period. The study resulted that the spin-off policy has a significant effect on the level of efficiency. When the spin-off is implemented, Islamic banks will operate more efficiently. For this reason, it is necessary to do: First, Sharia units planning to conduct a spin-off need to forecast the level of efficiency that may be achieved in the future. If this is included in the bank's business plan, the FSA will easily supervise the process. Second, it is necessary to formulate appropriate policies by creating innovative Islamic banking products so that profitability increases and efficiency is achieved.¹⁷ Similarly, Itang stated that early/now or 2023 Spin-Off opportunities could reach the profit size of early entrants in positioning and market capture, then ICB is the best choice. ICB can creatively dominate iB's market share.¹⁸

Sulasi Rongiyati stated another benefit: the policy of granting permits for the establishment of SBU by conventional commercial banks, which is temporary and mandatory for a 2023 spin-off, can encourage Sharia banking practices that prioritize Sharia principles without intervention by the conventional bank's parent policy, be flexible in business decision making, and compete with conventional banks.¹⁹

Readiness of the spin-off for Islamic banks

Through the 2019 Indonesian Islamic Finance Development Report, the realization of the latest Sharia banking spin-off policy can be identified. In reality, 30 out of 34 Islamic banks (14 ICB and 20 SBU) had a conventional parent bank (parent/sister company). In this regard, one of FSA's strategic programs in the

17 Zulfikar Bagus Pambuko, "Kebijakan Spin-off Dan Efisiensi Perbankan Syariah Di Indonesia," *Ibtifaq: Journal of Islamic Economics, Finance, and Banking* 2, no. 1 (2019): 21, <https://doi.org/10.12928/ijiefb.v2i1.822>.

18 Itang Itang, "Peluang Dan Tantangan Spin Off Unit Usaha Syariah Menjadi Bank Umum Syariah," *Alqalam* 33, no. 1 (2016): 24, <https://doi.org/10.32678/alqalam.v33i1.383>.

19 Sulasi Rongiyati, "Pengembangan Perbankan Syariah Melalui Pelaksanaan Kewajiban Pemisahan Unit Usaha Syariah," *Negara Hukum* 6, no. 1 (2015): . 65-78.

2015-2019 Indonesian Islamic Banking Roadmap is to encourage the increased commitment of Islamic bank holding companies through increasing capital and business scale, improving efficiency through optimizing the parent role, and developing Islamic banking services to achieve a minimum share of 10% of CCB parent assets. As of 2019, there had been eight SBUs that had exceeded 10% of their parent CCB assets.

Considering the assets, capital, and soundness of the existing 20 SBUs, 50% of those are not ready to separate themselves from their parent. Moreover, in the COVID-19 pandemic conditions, banks that supervise several SBU tend to be on the *qui vive* with sufficient capital due to the potential for the increased risk of non-performing financing (NPF).

The obligation to spin-off is an unpopular policy in the world due to the existing trend that the state prefers a dual banking system model that maintains the form of a Sharia business unit and has an ICB form. Apart from Indonesia, the country that requires the change from SBU to ICB is Qatar, while other countries still maintain the SBU form and the ICB form as complementary forms in the form of Sharia banking.

Meanwhile, to encourage the spin-off of SBU, the Chairman of the Non-Regulatory Committee of Asbisindo, Herwin Bustaman, assessed that several issues must be considered, starting from the strength of capital SBU performance that is better than Islamic commercial banks to the challenges of technological transformation.

Spin-off Stages of Sharia Business Units to Islamic Commercial Bank

The requirements and procedures for the SBU spin-off to become an ICB, according to POJK Number 59 of 2020, are as follows: SBU spin-off can be completed by establishing a new BUS or transferring SBU rights and obligations to an existing BUS. The SBU spin-off by establishing a new BUS can be done by 1 (one) or more CCBs that own SBU. The establishment of a BUS resulting from the spin-off must obtain an OJK permit with a paid-up capital of at least Rp. 1 trillion (69 million USD) for members of the Bank Business Group or Rp. 3 trillion (207 million USD) for other than members of the Bank Business Group, and in cash. SBU spin-off by transferring the rights and obligations of existing BUS can be done to ICB, which has or has no ownership connection with the BUS that owns SBU.

Requirements for the result of the ICB spin-off include fulfillment of the Minimum Capital Adequacy Ratio (MCAR) in line with FSAR regarding the

minimum capital adequacy requirement of BUS; and the highest gross non-performing financing (NPF) ratio is 5% (five percent). The settlement of exceeding the Maximum Fund Distribution Limit (MFDB) due to the SBU spin-off is no later than 18 (eighteen) months. The ICB resulting from the spin-off or the ICB receiving the spin-off may apply for an extension of the MFDB settlement period if, based on the assessment, the ICB resulting from the spin-off or the ICB receiving the spin-off requires the completion time of the MFDB to exceed 18 (eighteen) months.

CCB that makes capital participation due to SBU spin-off is exempted from the soundness level requirement for banks that will make capital participation in line with FSAR regarding prudential principles in capital participation activities. CCB that owns SBU may apply for approval to implement banking cooperation with BUS resulting from the spin-off simultaneously with the application for the establishment of BUS resulting from the spin-off or request for approval for the SBU spin-off. Spin-off by transferring the rights and obligations of SBU can be done to another CCB on the condition that the other CCB must change the business activities of CCB to ICB.

Figure 1. Article 7 (1) of Law Number 12 of 2019 concerning the Establishment of Legislation



Source: Article 7 (1) of Law Number 12 of 2019

The studies in the list are based on the background of the idea that the mandate of Article 68 of Law Number 21 of 2008 regarding the maximum banking SBU spin-off obligation in 2023 is less relevant to the goal of realizing an efficient, competitive, and sustainable Islamic banking industry. Furthermore, after conducting some analysis, the results show that field data analysis shows that a well-managed SBU is relatively more efficient than a BUS based on the majority of banking financial ratio assessments. It indicates the effectiveness of the SBU forms compared to being enforced to implement the BUS form. The form of SBU is considered one of the Sharia divisions that still receive technological assistance and funds from the parent bank. Thus, it barely needs a lot of budget to grow. Apart from that, UUS can still use the information technology owned by the parent and employ the existing human resources at the parent company of the SBU.

Business analysis shows that the spin-off strategy is not the only solution for industrial development; from 9 to 12 SBUs out of 20 SBUs are estimated to be unprepared for the spin-off in 2023. Sharia analysis concludes that Sharia compliance is maintained in the institutional status of both ICB and SBU. The legal analysis revealed that policies, which are considered counter-spin-off but positive for the banking industry, have been and will be issued by the regulator (e.g., banking consolidation and initiation of increasing bank core capital). The academic perspective indicates that the spin-off obligation contrasts with the trend of increasing market power in the national banking industry.

The development of Islamic banking established in 1992 has insignificantly increased in the correct direction. This condition makes the Islamic banking industry consider a breakthrough that can at least boost the increase in the market share of Islamic banking in Indonesia, which until now is still at 6.65%. This figure has not increased from the previous years. One of the breakthroughs taken several times ago was the merger of three state-owned Islamic banks, namely Bank Rakyat Indonesia Syariah (BRIS), Bank Syariah Mandiri (BSM), and Bank Negara Indonesia Syariah (BNIS), to become Bank Syariah Indonesia (BSI). With the merger of those three central Islamic commercial banks, it is expected that the Islamic banking industry can burgeon faster because they are superior in terms of capital, and it is expected to increase the market share of Islamic banking in Indonesia.

Another step that the government is trying to take concerning increasing the development of Islamic banking in Indonesia is the policy issued in Article 68 of the Sharia Banking Law, which stipulates the obligation to implement a spin-off no later than 2023. This policy is visionary and has risk potential. It is considered visionary because if this policy is implemented correctly and successfully, there will

be an acceleration of the growth of Islamic banking. However, when this policy is not correctly implemented, the consequences will also be appalling for the Islamic banking industry. If the spin-off scenario fails, many SBUs will have to close their business. Based on the law's orders, their business license will be revoked if they cannot do the spin-off within the stipulated period. If many SBUs are not ready for the spin-off and have to close their businesses, a decline in the market share of Islamic banking will occur, which will undoubtedly have a massive impact on the development of this industry in general.

Law Number 21 of 2008 concerning Islamic Banking stipulates that SBU owned by Conventional Commercial Banks must carry out a spin-off no later than 15 years after the issuance of the law. In other words, the SBU must be separated from the parent conventional Commercial Bank (CB) before 2023 ends. This obligation also applies to SBU with an asset value of 50% of the total value of its parent bank. If this obligation is not implemented, then the government, the current FSA, can revoke the SBU business license (PBI number 11/10/PBI/2009 Article 43 (1)). However, SBU can also be separated from its parent bank before meeting these two conditions. The SBU spin-off from its parent CB is a strategic step to capture market opportunities or the public's need for Islamic financial services. In addition, according to Umam, the separation of SBU from ICB also increases the level of compliance with Sharia. If the SBU that is converted into SCB has its separate legal entity from its parent (subsidiary), the transformation of the SBU into ICB must continue.

The policy regarding this spin-off needs to be reviewed by policymakers; therefore, the consequences are not detrimental to the development of the Islamic banking industry in the future. The most prospective proposal that can be completed is to change the existing requirements as mandated by the law into a corporate action where the implementation is based on the readiness of each Business Unit. Thus, even though the spin-off is still an obligation of SBU, the period stipulated by the act is removed and submitted based on the readiness of each unit. It is more conceivable to be implemented because each unit will design the spin-off implementation according to its ability. To change the mandate of the act into corporate action, the following three options that can be done: (1) Issuing FSAR that regulates spin-off, which is a corporate action. (2) Amending Article 68 by submitting a judicial review to the Constitutional Court. (3) Making an amendment by issuing omnibus law in the field of Sharia Economics. These options have advantages and disadvantages that will be discussed to take the correct option to advance the Islamic banking industry in Indonesia.

Issuance of Financial Services Authority

Stufenbau's legal theory was put forward by Hans Kelsen which states that the legal system is a ladder system with tiered rules where the lowest legal norms must rely on higher legal norms, and the highest legal rules (such as the constitution) must rely on the most basic legal norms (*grundnorm*). The FSA is an independent institution that has the functions, duties, and powers of regulation, supervision, inspection, and investigation.²⁰ FSA was established based on Law Number 21 of 2011, which functions to organize an integrated regulatory and supervisory system for all activities in the financial services sector.²¹ FSA was established to replace the role of Bapepam-LK in regulating and supervising the capital market and financial institutions, replacing the role of Bank Indonesia in regulating and supervising banks and protecting consumers in the financial services industry.²² Hence, the authority of the FSA is comprehensive, not only limited to bank financial institutions but also non-bank financial institutions.

OJK conducts regulatory and supervisory duties on: (1) Financial services activities in the banking and non-banking sectors. (2) Financial services activities in the capital market sector; and (3) Financial service activities in the insurance sector, pension funds, financing institutions, and other financial service institutions.²³

If you look at the authority of the FSA in setting regulations, it can be seen that its jurisdiction is comprehensive. One of which is to stipulate the Regulation of the FSA, a legal product of the FSA that is highly technical in nature and serves as a delegated regulation. The advantage of using FSA as one of the proposals to annul Article 68 is that FSA is equivalent to regulation at the ministry level. Therefore, it is effortless to promulgate. There is no need for a complicated bureaucracy to issue FSA other than that FSA is made only by FSA. Hence, the composition is relatively homogeneous, so differences of opinion can be minimized. In the speed with which the FSA is enacted, it is very reliable.

However, in the strength of the implementation of this FSA, there is one problem in the composition of Law 12 of 2011 concerning the Formation of Legislation, which mentions the order of legislation in Indonesia that does not

20 Subhan Zein, "Tinjauan Yuridis Pengawasan Otoritas Jasa Keuangan Terhadap Aplikasi Pinjaman Dana Berbasis Elektronik (Peer To Peer Lending / Crow Funding) Di Indonesia," *Jurnal Bisnis Dan Akuntansi Unsurja* 28, no. 2 (2019): 01051.

21 Dona Budi Kharisma, "Urgency of Financial Technology (Fintech) Laws in Indonesia," *International Journal of Law and Management* 63, no. 3 (2021): 320–31, <https://doi.org/10.1108/IJLMA-08-2020-0233>.

22 Glenn Divy Parrangan, "Fungsi Otoritas Jasa Keuangan Dalam Melindungi Kepentingan Konsumen Dalam Perjanjian Pembiayaan," *Lex Administratum* 6, no. 4 (2018): 131–39.

23 Otoritas Jasa Keuangan, "FAQ Otoritas Jasa Keuangan," accessed May 28, 2022, <https://www.ojk.go.id/id/pages/faq-otoritas-jasa-keuangan.aspx>.

explicitly mention the location of the FSA. How is the binding power of POJK when it is not stated in the laws and regulations? The regulation and binding power of the POJK are then explained in the following article, namely Article 8(1), which states that the types of legislation other than those referred to in Article 7 paragraph (1) include regulations stipulated by the People's Consultative Assembly, the House of Representatives, Regional Representative Council, Regional Representative Council, Supreme Court, Constitutional Court, Audit Board of the Republic of Indonesia, Judicial Commission, Bank Indonesia, Minister, agency, institution, or commission of the similar level established by law or by the Government on the orders of the Act, Provincial Regional House of Representatives, Governor, Regency/City Regional People's Representative Council, Regent/Mayor, Village Head or equivalent.²⁴

With this article, FSA is included in regulations issued by institutions established by law because FSA is an institution established by Law Number 21 of 2011 concerning FSA. Hence, the binding power of the FSA is well-defined in the Indonesian laws and regulations. The weakness of this POJK is that, in sequence, the laws and regulations are under the law. If it is observed from the perspective of Hans Kelsen's legal theory, the rules below must not conflict with the rules above, thereby making the FSA constitutionally unable to amend the rules in Article 68. However, FSA can provide technical guidelines regarding its implementation.

Conclusion

The conditions for the implementation of the SBU separation policy will come into effect in 2023. With the separation deadline approaching, there are many SBUs whose capital has not yet reached 50%, so by regulation, they cannot spin-off, but the deadline is approaching. Therefore, there is a discourse to make changes to Article 68. The mandate of Article 68 of Law No. 21 of 2008 concerning the obligation to spin off the SBUs of banks by 2023 is less relevant to the goal of realizing an efficient, competitive, and sustainable Islamic banking industry. From several notes on the results of the study above, it is recognized that spin-off is indeed needed as one of the strategies for developing financial services institutions, especially Islamic banking. However, the concept of its implementation needs to be evaluated and strengthened, so that several problems, in terms of technical guidelines for spin-off, capital, and the size of the target time, can be re-conceptualized to be more

²⁴ Annisa Hanifah, Budi Santoso, and Ismail Navianto, "Urgensi Pengaturan Perusahaan Gadai Swasta Dengan Sistem Online," *Al-Mustashfa: Jurnal Penelitian Hukum Ekonomi Islam* 2, no. 3 (2018): 2018.

realistic. There are three methods to change the mandate of Article 68 regarding spin-offs into corporate actions, namely issuing a FSAR which makes spin-offs a corporate action. This method is unconstitutional because FSAR is structurally under the law. The second alternative is done by submitting a judicial review of Article 68, and the third is by enacting an omnibus law on Sharia economics. Those three alternatives have advantages and disadvantages, so further study is needed to gain solutions for the advancement of Islamic banking.

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