

REGULATION OF CROWDFUNDING IN INDONESIA

Soonpeel Edgar Chang¹
Korindo Group
soonpeel.chang@gmail.com

Abstrak

Industri Crowdfunding (penggalangan dana) di Indonesia telah berkembang dengan pesat dalam beberapa tahun terakhir. Sangat kontras berbeda dengan crowdfunding berbasis utang, sangat sedikit perusahaan yang melakukan crowdfunding berbasis ekuitas, yang merupakan jenis lain dari crowdfunding, muncul dan redup pada tahun 2017. Saat ini, tidak ada bisnis crowdfunding berbasis ekuitas atau peraturan terkait sementara OJK telah mengumumkan rencananya untuk mengadopsi peraturan terkait pada akhir tahun 2017. Dengan latar belakang ini, tulisan ini membahas bagaimana hukum dan peraturan di Indonesia menghambat munculnya bisnis crowdfunding berbasis ekuitas: (i) permasalahan waktu dan biaya yang tidak efisien dalam hukum perusahaan, dan (ii) potensi pelanggaran terhadap hukum dan peraturan pasar modal.

Kata Kunci: P2P Lending, Crowdfunding, Equity Crowdfunding

Abstract

The Indonesian crowdfunding industry has rapidly developed in recent years. In sharp contrast to debt-based crowdfunding, very few companies attempted equity crowdfunding, which is another type of crowdfunding, appearing and closing in 2017. Currently, there is no equity crowdfunding business or related regulations while OJK announced its plan to adopt the relevant regulation in late 2017. Against this background, this paper discusses how laws and regulations of Indonesia obstruct the rise of the equity crowdfunding business: (i) inefficient time and cost problems in company law, and (ii) potential violations against the laws and regulations in the capital market.

Keywords: P2P Lending, Crowdfunding, Equity Crowdfunding

A. Introduction

Financial exclusion refers to a process in which people encounter difficulties accessing and/or using financial services and products in the mainstream market that are

¹ Legal manager at Korindo Group in Indonesia and President Director of Dutchindo Holding BV in the Netherlands, Master of Law (LL.M) from New York University School of Law and National University of Singapore, Master of International Accounting (Macc) from Sokang University, Bachelor of Law (LL.B) from SungKyunKwan University and currently studying at (S.H.) Pancasila University.

appropriate to their needs, and enable them to lead a normal social life in the society.² Financial inclusion refers to a process to resolve or mitigate financial exclusion. The financial industry in Indonesia is rapidly developing under the regime of financial inclusion, armed with GDP growth in the 5% range and the surging middle class. That is because there is a considerable void to be filled by financial services, as the individuals officially connected to formal financial institutions account for only 22% of entire population (in 2015), and roughly only 36% of people over 15 have a bank account (in 2014).³

Under this rapid growth of overall financial industry, Fintech is showing substantial development. Fintech or Financial Technology is essentially any technological innovation in a financial sector, including stock trading apps and websites, peer-to-peer lending sites that increase competition for loans thereby reducing rates, robo-advisor services that provide algorithmic bases for portfolio management, all-in-one online personal finance management and budgeting tools, etc. Among them, we here focus on peer-to-peer (P2P) lending for the purpose of this paper.

In Indonesia, P2P lending companies have extended 2.6 trillion rupiah (USD 193.8 million) as of January 2018, compared with just 247 billion rupiah in December 2016.⁴ So far, thirty P2P lending companies including Investree (2014), Modalku (2015), Zidisha (2009), Koinworks (2016) and Amarthia (2010) have been established in Indonesia and another thirty-six companies are currently in process to obtain business permits as of January 2018.⁵

The growth of Fintech in Indonesia was made while its economic fundamentals were not very solid and even basic infrastructure of the internet was not sufficiently set up. As P2P lending is a new alternative to resolve the financial burdens of the working class, Indonesian experts are strongly expecting a large momentum for their Fintech industry, based on the country's population of 261 million, and its economic growth rapidly filling the vacuum in

² European Commission, "Financial Services Provision and Prevention of Financial Exclusion" (March 2008), p. 9.

³ Jonathan Keane, "Indonesia is Priming Itself for a Fintech Future" *IDG details* (9 December 2015).

⁴ Fransiska Nangoy, et. al., "Indonesia's fintech lending boom exploits shortfall in bank loans," *Thomson Reuters* (30 January 2018)

⁵ Dodi Esvandi, "Baru 32 Fintech P2P Lending yang Terdaftar di OJK," *Tribunbisnis*, 31 January 2018.

internet infrastructure.⁶

Certainly, Indonesia has a desperate need of the low interest rates reducing transaction costs. Experts often view the fact that 78% of the entire population is under financial exclusion, meaning there is a large potential for growth of P2P lending in the future,⁷ and analyze it as if the future demand of P2P lending is destined to be strong because the number of micro-and-small enterprises per 1,000 adults in Indonesia overwhelms the number in other emerging Asian countries.⁸

Reflecting the demand and growth of the market, an association has been spontaneously set up by the market participants to promulgate and apply the best practices and amplify their voices to legislative bodies. Fintech Indonesia was jointly established in September 2015 by not only P2P Finance companies but also a variety of Fintech companies, legal and financial consultants and relevant financial institutions.⁹

On the other hand, the risks are considerable. Misusing such businesses is highly problematic and any failures are spread over many ordinary investors or lenders who cannot be protected under the government's deposit guarantee. Of particular concern is that the online platform can be used for property speculation or pyramid schemes. This risk is higher in Indonesia where financial exclusion is so high in the status quo that most regular people are expected to seek crowdfunding. Moreover, specific regulation or an effective supervisory system against property speculation or pyramid schemes has not developed.

Indeed, the financial frauds substantially increased and became cleverly engineered disguised as P2P lending or crowdfunding in South Korea from 2015 to 2016, when the crowdfunding business emerged.¹⁰ South Korea is now developing the legal tools to regulate and supervise the new types of financial frauds in this line.¹¹ China, the largest P2P lending

⁶ Antonia Timmerman, "Indonesia comes out with regulations for P2P lending platforms," *Deal Street Asia*, 5 January 2017.

⁷ Oxford Business Group, "Indonesian FinTech Start-ups Raise Stakes for Banks" (15 June 2015)

⁸ In 2014, the number of small- and middle-sized enterprises per 1000 adults in emerging Asian countries was: China (100), Malaysia (116), Philippines (58), India (57) and Indonesia (358). Jason Ekberg, et al. "Time for Marketplace Lending Addressing Indonesia's Missing Middle," Oliver Wyman, 2016, p. 3

⁹ This association launched in the attendance of the chief of the Indonesian Financial Services Authority (*Otoritas Jasa Keuangan*; OJK) and key persons in Indonesian financial industries and has been joined by 117 startup companies, 23 financial institutions and 7 association partners.

¹⁰ Korean Financial Supervisory Service, 19 August 2016, Press Release.

¹¹ *Ibid.*

market, also suffered from a variety of side effects from the market's rapid growth such as a surge of platforms involved in illegal activities, fraudulent behaviors, liquidity problems and excessive interest rates.¹² It dissolved thousands of P2P lending companies after announcing the Draft Rule for Management of the Chinese Peer-to-Peer Lending Companies in 2016, and prohibited both the establishment of any additional P2P lending companies and extending the business to new geographical regions by existing P2P lending companies.¹³

Nevertheless, the P2P finance industry is still in the very early stages and thus any supervisory system and regulatory frame must be based on sufficient consideration about how to develop this new industry. Considering all these, Indonesian Financial Services Authority (*Otoritas Jasa Keuangan: "OJK"*) put in force Regulation No.77/POJK.01/2016 concerning Information Technology–Based Money Lending Services ("P2P Lending Regulation") in 2016.^{14,15} In the same year, the central bank, Bank Indonesia, created a "Fintech Office" to prepare the regulatory sandbox and OJK found "Fintech Hub" to foster the Fintech industry with a minimum of regulations. In the meantime, the Ministry of Communication and Information (*Kementerian Komunikasi dan Informatika*) was entrusted with the care of the technological aspects.¹⁶

In sharp contrast to P2P lending, some companies attempted equity crowdfunding, which is another type of crowdfunding, appearing in 2017 and closing in the same year. Currently, there is no equity crowdfunding business or related regulations. While OJK announced its plan to adopt the relevant regulation in late 2017, the detailed substance has not

¹² Juheng Li, "China's Lending Crackdown is Notable for Three Reasons", Bloomberg, 30 November 2017; Emily Feng, "China toughens regulations on payday lenders", *Financial Times*, 1 December 2017; Korea Development Bank, "China's Strengthened P2P Lending Regulations and Future Expectation," *Weekly KDB Report*, 5 September 2016.

¹³ *Ibid.*

¹⁴ *Peraturan Otoritas Jasa Keuangan Nomor 77/POJK.01/2016 tentang Layanan Pinjam Meminjam Uang Berbasis Teknologi Informasi* (OJK Regulation on Information Technology-Based Money Lending and Borrowing Service).

¹⁵ Since 2013, OJK has been working as a supervisory authority of bank, insurance, capital market, and non-banking financial institutions.

¹⁶ Some criticized that the central bank, OJK and Ministry of Communication and Information fragmented regulations without enough consultation, all having different visions and confusing the market participants. See Alisha Sulisto, "Who owns Fintech?" *The Jakarta Post*, 13 December 2016. Indeed, it is inevitable to have a conflicting or different vision between the Ministry of Communication and Information focusing on the innovation of information technology and the Financial Supervisory Authority focusing on a stable financial industry.

been disclosed.

Against this background, this paper discusses the current status and regulations concerning crowdfunding in Indonesia.

B. Discussion

B. 1. The Types of Crowdfunding

B.1.1. In General

Crowdfunding generally means “an act of disclosing and advertising one’s own project or venture through the internet by a person who needs funds for such a project or venture in order to raise many small amounts of money from a large and unspecified number of the general crowd.”¹⁷ Precisely saying, it can also mean “an act of ‘many a little makes a mickle’ to raise a small amount of money from the general public for a certain project of a startup enterprise, micro business, artists or social activists who have difficulty borrowing money from financial institutions.”¹⁸

Typically, the crowdfunding sites are divided into donation, reward, pre-purchase, debt-based (or lending), and equity-type. Donation, and reward and pre-purchase models do not need to be regulated because they are merely a donation or private consumption as a good deed. On the other hand, equity sites inciting investors with financial tools, and lending sites streaming gradually larger amounts with a risk of fraud must be separately regulated.

B.1.2. Equity Crowdfunding

The type of crowdfunding that finances an early-stage unlisted company by offering issuing stocks, bonds or other securities to broad groups of investors is referred to as equity crowdfunding or investment crowdfunding (“Equity Crowdfunding”). Although securities and equity are different, the term Equity Crowdfunding has been already well settled.

The P2P Lending Regulation governs only lending or debt-based types by explicitly stating “a P2P Lending Broker shall provide an interest rate offered by a Lender and a

¹⁷ Min Seop Yun, “A Legal Study on the Crowdfunding as Means of Obtaining Capital,” *Korean Journal of Business Law*, Vol. 26 No.2, (Korean Business Law Association, 2012), p.188.

¹⁸ Seong, Hye Hwal, “A Study on the Regulatory Framework for the Equity Crowdfunding,” *Korean Journal of Securities Law* Vol. 14, No.2, (Korea Securities Law Association, 2013), p. 393.

Borrower in consideration of the fair value and the ongoing national economics” (Article 17), requiring a clear stipulation of interest rate in the agreement (Article 19, paras. 2 to 5; Article 20), and defining financials as a lender, not an investor. Any fund raising through securities such as equity securities, beneficiary certificates, notes or securitized derivatives are not regulated under the P2P Lending Regulation.

The reason why Indonesia P2P Lending Regulation has been made without any stipulation about Equity Crowdfunding is simply that there was no Equity Crowdfunding business in Indonesia at the time of adopting the P2P Lending Regulation. Some enterprises such as Akseleran and Crowdo began Equity Crowdfunding in the beginning to middle of 2017 and accordingly OJK officially started to study and draft relevant regulation.¹⁹ Nonetheless, as both of the business stopped Equity Crowdfunding in the same year, declaring a focus on P2P Lending only, there is currently no Equity Crowdfunding business in Indonesia.

B.1.3. Debt-Based Crowdfunding

A lending type of crowdfunding that solicits loans from the crowd is widely referred to as peer to peer lending or P2P lending (“P2P Lending”). P2P Lending is further classified into lending via an intermediary brokerage (“P2P Lending via a Broker”) and direct lending between a lender and a borrower without any third-party dealer (“P2P Lending without a Broker”).

P2P Lending via a Broker is again divided into money lending between a lender and a borrower via a broker (“Typical P2P Lending”) and a lending structure that is intricately modified in order to overcome certain legal restrictions (“Modified P2P Lending”).²⁰ In South Korea, for instance, anyone who wants to work as an intermediary between lenders and borrowers must be officially registered and can introduce a borrower to a registered financial lender only under Article 11-2 Paragraph 1 of the ‘Act on Registration of Credit Business, Etc. and Protection of Finance Users.’ Namely, it was not legally permitted to do Typical P2P

¹⁹ Dinda Audriene Muthmainah, “Mitigasi Risiko, OJK Siapkan Beleid Equity Crowdfunding,” *CNN Indonesia* (17 November 2017)

²⁰ Dong Won Ko, “Legal Review on Peer-to-Peer Lending in Korea,” *Korean Journal of Banking and Financial Law*, Vol. 8 No. 2 Korean Banking and Financial Law Association (November 2015), p. 17

Lending business and thus it needed to modify the structure into a more legitimate form.²¹

In the meantime, there was no such restriction in Indonesia, such that the business holder does not need to modify the Typical P2P Lending structure. Naturally, Typical P2P Lending has emerged as the mainstream in P2P Lending industry of Indonesia. Against such a backdrop, the P2P Lending Regulation adopted governs Typical P2P Lending only. Therefore, this paper hereinafter calls an operator of P2P lending business as a “P2P Lending Broker” for the sake of simplicity and clarity.

B. 2. The Type Stipulated under the P2P Lending Regulation: P2P Lending via a Broker

The P2P Lending Regulation names P2P Lending businesses “Information Technology–Based Money Lending Services” and defines these as “providing financial services to match a lender with a borrower to enter into a loan agreement in Rupiah currency directly through electronic systems using internet networks.” (Article 1 Paragraph 3)²²

Here the loan agreement means a credit agreement for money lending. Since this is not a lending agreement with a financial institution, Book 3 Chapter 13 of Civil Code (*Undang-Undang Hukum Perdata*) governs the agreement.²³ There is no separate act concerning interest limitations in Indonesia. Instead, unjust enrichment under Ordinance of No. 524 of 1938 on Combating Usury may apply.²⁴

A P2P Lending Broker analyzes the possibility of successful repayment based on the data from a potential borrower, discloses it to a potential lender, performs collection of debts and related administration and levies certain fees and charges from each debtor and creditor.

In Indonesia, a P2P Lending Broker does not necessarily broker to a financial

²¹ *Ibid.*, p. 18–23

²² “*Layanan Pinjam Meminjam Uang Berbasis Teknologi Informasi adalah penyelenggaraan layanan jasa keuangan untuk mempertemukan pemberi pinjaman dengan penerima pinjaman dalam rangka melakukan perjanjian pinjam meminjam dalam mata uang rupiah secara langsung melalui sistem elektronik dengan menggunakan jaringan internet.*”

²³ *Burgerlijk Wetboek voor Indonesia*. Nowadays, Money lenders Ordinance Year 1938 No.523 (*Geldeschieters Ordonantie. S.1938-523; Undang-undang Pelepas Uang*) is a dead letter and does not apply here. In case of Supreme Court of Republic of Indonesia “Decision No.71/Pdt.BTH/2016/PN.Sby,” the plaintiff claimed that defendant violated Article 14 of this ordinance and yet the Supreme Court did not even answer to this argument, totally ignoring the claim.

²⁴ *Woekerordonnantie 1938, Stb. 1938 No. 524*

institution such as a registered financial lender or savings bank and thus can introduce a borrower to ordinary individuals through a crowdfunding webpage. Currently, most of P2P Lending Brokers registered at OJK for P2P Lending business are directly brokering lending transactions pursuant to the P2P Lending Regulation.

Despite varieties of debt-based crowdfunding, the P2P Lending Regulation governs only Typical P2P Lending. It does not separately regulate Modified P2P Lending. In my opinion, because the types of Modified P2P Lending are numerous and the legal status, rights and obligations of P2P Lending Brokers, borrowers and lenders therein are all vary, the current P2P Lending Regulation that concisely normalizes them into one simple standard is excellent in providing legal protection for stakeholders.²⁵

B. 3. The Type Not Stipulated under the P2P Lending Regulation: P2P Lending without a Broker

In the P2P Lending without a Broker, the one who needs funds promotes his project and calls for lending through an online site by himself, and directly makes a credit agreement with lenders absent assistance of a third-party intermediary. Because there is no institution who can assess the borrower's credit or possibility of successful repayment in P2P Lending without a Broker, crowds are unwilling to advance a loan to the stranger who has a low profile.²⁶

An example of P2P Lending without a Broker is BursaIde.com, created by students in an Islamic boarding school at *Pesantren Wirausaha Daarul Muttazin* who sought resources to implement their ideas for entrepreneurship. This webpage is known as the beginning of crowdfunding sites and the origin of the P2P Lending business in Indonesia.²⁷ The students listed their ideas on BursaIde.com and reported the development of their projects, which had

²⁵ See Min Seop Yun, "A Legal Study on the Lending Model Crowdfunding," *Korean Journal of Banking and Financial Law*, Vol. 6 No. 2 (*Tempat*: Korean Banking and Financial Law Association, November 2013), p. 98. Min Seop Yun has the same opinion based on that (i) a lender cannot acquire preference in collection of debt under the mutated version of P2P Lending because the financial institution has the official credits; (ii) a lender may be unexpectedly damaged if the financial institution or broker delays the collection of debt or foreclosure; and (iii) standard P2P Lending can reduce the interest rate than the modified versions do and thus is very useful for ordinary people as an alternative financing tool.

²⁶ *Ibid.*, p. 84

²⁷ Nadine Freischald, "Five crowdfunding sites in Indonesia," *TechinAsia* (1 May 2015)

successfully attained investment from a third-party investor.²⁸

Nonetheless, the P2P Lending without a Broker is barely used nowadays because a money lender has difficult to recognize the borrower's creditworthiness. BursaIde.com has also closed.

Currently, a P2P Lending Broker is not permitted to participate in P2P Lending as a lender or borrower (Article 43 Item b). In other words, one cannot establish an online platform and work as a P2P Lending Broker in order to call for lending for one's own project.

B. 4. Why Equity Crowdfunding Initially Failed in Indonesia

B.4.1. Failures and Frustrations So Far

Akseleran was the first Equity Crowdfunding business that obtained an approval from OJK.²⁹ An experienced lawyer from Allen & Overy, Ivan Nikolas Tambunan, established the business himself in 2017 with an attempt to solve the legal problems hindering appearance of Equity Crowdfunding in Indonesia. Sadly, even this sophisticated lawyer was also frustrated and closed the Equity Crowdfunding business in the same year declaring its business would focus on P2P Lending only. Similarly, Crowdo, which carries on both Equity Crowdfunding and P2P Lending business in Singapore and Malaysia, also failed at successfully running an Equity Crowdfunding business in Indonesia and is now conducting only P2P Lending using a promissory note.

As discussed later, the applicable laws and regulations of Indonesia make Equity Crowdfunding virtually impossible to develop. In order to overcome this legal diseconomy, Akseleran deformed its business structure from the typical models used in foreign countries but hit a snag again. As a good example of how the costly laws frustrate Equity Crowdfunding, this part analyzes the structure of Akseleran's model as used in 2017.

B.4.2. The 100% Rule

Akseleran adopted a general character of Equity Crowdfunding to reach a 100%

²⁸ Julian Sukmana Putra, 'Bursalde.com, the First Indonesian Crowdfunding Site,' *TechinAsia* (4 April 2011)

²⁹ Achmad, "Ivan Nikolas Tambunan, Co-Founder dan CEO Akseleran: Selalu Ingin Bantu Usaha Kecil," *Koran Jakarta*, 2 December 2017.

threshold. If the total amount offered by the investors failed to reach 100% of the target amount within 60 days, the entire plan to issue the shares to these investors was rendered canceled and void, whereby any deposits must be returned to the investors. This all-or-nothing strategy developed in the U.S. uses collective intelligence, in that if a business successfully raises 100% of its targeted funds, the business prospect is believed to be highly encouraging and trusted in the market.³⁰

Albeit achieving 100% of the targeted amount is truly difficult in Indonesia because of little incentive for investment as discussed below, this was not the deciding factor in the frustration of successful Equity Crowdfunding business in Indonesia. Since the 100% rule is a merely internal policy of an initial business model after all, it could be simply eased or some exceptions made case by case. For instance, if all the investors unanimously agreed to carry on the investment to a certain project that has failed to reach the targeted amount on condition that the investee provides a satisfying plan to further raise the rest of investment needed, there is no good reason to prohibit this. South Korea applies a 80% rule.³¹ In other words, it is not necessary to have 100% achievement to get sufficient trust from the investors in the market.

B.4.3. Legal Structure and Problems

The biggest character of Akseleran's model is that it established a separate company ("PT. Akseleran") to collect the investors' money in consideration of certain rights granted to the investors, and has this new company become a majority shareholder of the target company by contributing the collected cash to it.³²

³⁰ 석지웅, "증권형 크라우드펀딩제도 (온라인소액투자중개) 도입현황 및 시사점," 정보통신방송정책, 제28권 10호 통권 624호, 16쪽.

³¹ *Ibid.*

³² <https://www.akseleran.com/pertanyaan-umum/investasi>, accessed on 28 February 2018

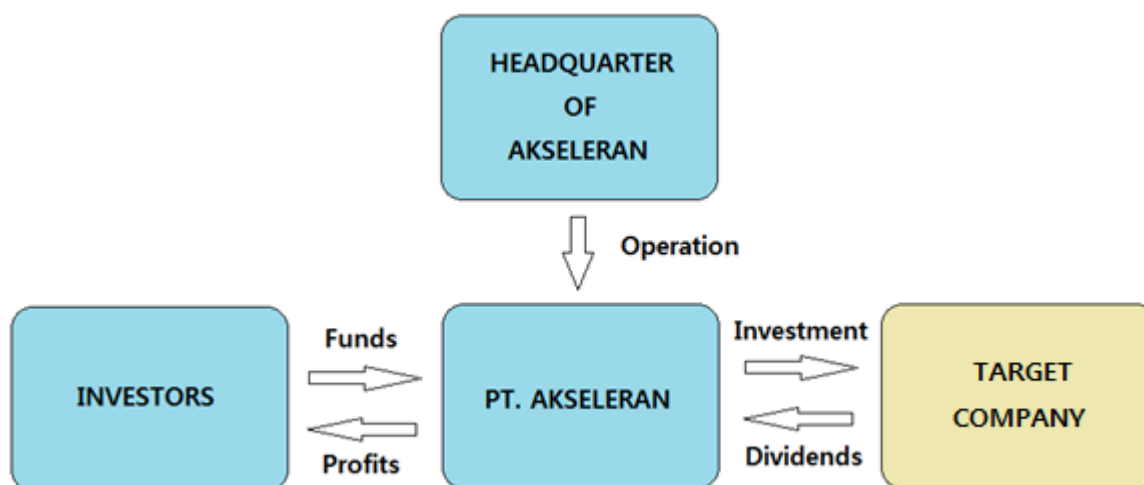


Figure 1. The Equity Crowdfunding Structure of Akseleran.

Although the investors have PT. Akseleran become the shareholder of the target company, they are not shareholders or owners of the target company because they do not have a direct stock in PT. Akseleran.³³ Also, the investors' rights are not freely sellable or transferrable according to the agreement. Therefore, these investors can withdraw their investment only (i) when a strategic subsequent investor comes in to buy out most of the shares in the target company; (ii) when the target company goes public and lists their shares in capital market; or (iii) when PT. Akseleran is sold out to any third party.³⁴ Even though the investors can earn dividends from retained earnings before any of this event occurs, dividends cannot be a conclusive reason for investment because most businesses generally take a long time to reach the break-even point and even if it reaches this somehow at an early time, it may re-invest their profits for business expansion.³⁵

³³ *Ibid.* "Apakah Saya Akan Menjadi Pemegang Saham Secara Langsung Dari Usaha Yang Saya Investasikan? Pada umumnya, investor di Akseleran tidak akan memegang secara langsung saham dari usaha yang diinvestasikannya. Akseleran atau afiliasi dari Akseleran akan menjadi kustodian bagi para investor dan secara hukum memegang saham di perusahaan yang diinvestasikan investor."

³⁴ *Ibid.* "Dapatkah Investor Menjual Bagian Sahamnya Di Usaha Yang Diinvestasikan? Investor hanya dapat menjual bagian sahamnya apabila ada pembeli yang berminat. Biasanya penjualan saham dilakukan ketika (i) terdapat investor strategis yang membeli sebagian besar saham di perusahaan (buy-out), (ii) perusahaan telah melakukan penawaran saham perdana (IPO) di bursa saham, atau (iii) pendiri usaha melakukan buy-back atas saham yang dipegang investor. Investasi equity adalah investasi jangka panjang. Apabila anda perlu menjual atau mencairkan investasi anda dalam waktu dekat, maka investasi equity tidak cocok bagi anda."

³⁵ *Ibid.* "Apa Itu Dividen? Dividen adalah keuntungan yang dibagikan oleh suatu perusahaan kepada pemegang sahamnya. Start-up, usaha tahap awal dan UKM biasanya jarang membagikan dividen. Hal ini karena usaha-usaha tersebut biasanya akan menggunakan keuntungan yang dihasilkan untuk ekspansi lebih lanjut dari

Akseleran called itself a custodian (*kustodian*) that legally holds shares on behalf of the investors and carries on all the administrative work in place of the investors, such as preparing and signing all legal documents, obtaining approval or giving a notification to the Ministry of Law and Human Rights, conducting the company registration, etc.³⁶

Although it appears similar to venture capital, which analyzes the potential startup company and raises investments from third parties in observance of 2008 No.20 Law on Micro, Small and Middle Enterprise and 2015 OJK Regulations No.34 to 37, the above model is certainly different from venture capital in that it raises the funds from the general public through an online platform. A venture capital firm is not permitted to directly float investments from the crowd (Article 53 Item a of No.35/POJK.05/2015).

PT. Akseleran's job in the above structure is also similar to stock investment funds (also called as collective investment or collective investment vehicle) who invest customers' money to selective stocks and distribute the profits to the investors in observance of 1995 No.8 Law on Capital Market and Bapepam-LK Rules³⁷). It is, however, different from stock investment funds again in that it invests in a single unlisted startup company, floats investments from the crowd through an online platform and does not purchase a stock via any formal securities firm.

In the end, the Equity Crowdfunding structure that Akseleran planned in 2017 is not

usahanya, yang pada akhirnya juga akan memberikan nilai tambah bagi pemegang sahamnya.”

³⁶ *Ibid.* “Struktur kustodian ini kami gunakan untuk menyederhanakan proses administrasi yang harus dilakukan oleh para investor dan usaha yang menggalang modal melalui Akseleran. Dengan adanya kustodian, maka setiap investor tidak perlu menandatangani dan menghadiri dokumen-dokumen dan rapat-rapat yang harus dihadiri pemegang saham, kami akan melakukannya untuk anda. Begitu pula para usahawan tidak perlu untuk berhadapan secara langsung dengan seluruh investor satu-persatu, dan hanya perlu berhadapan dengan satu kustodian saja.”

³⁷ There are quite a number of governing regulations: Bapepam Rule No. IX.C.4 on Registration Statement for a Public Offering of an Investment Fund in the form of a Corporation; Bapepam-LK Rule No. IX.C.5 on Registration Statement for a Public Offering of an Investment Fund in the form of a Collective Investment Contract; Bapepam Rule No. IX.C.6 on Form and Content of a Prospectus for a Public Offering of an Investment Fund; Bapepam Rule No. IV.A.1 on Application Procedures for Obtaining a Business License as a Corporate Investment Fund; Bapepam Rule No. IV.A.2 on Guidelines for Articles of Association of a Corporate Investment Fund; Bapepam Rule No. IV.A.3 on Management Guidelines of a Corporate Investment Fund; Bapepam Rule No. IV.A.4 on Guidelines of Management Contracts of a Corporate Investment Fund; Bapepam Rule No. IV.A.5 on Guidelines of Custodian Contracts of Corporate Investment Fund's Assets; Bapepam-LK Rule No. IV.B.1 on Guidelines for the Management of Investment Fund in the form of Collective Investment Contracts; Bapepam-LK Rule No. IV.B.2 on Guidelines for Contract of Investment Fund in the form of the Collective Investment Contracts; Bapepam-LK Rule No. IV.B.3 on Exchange Traded Fund; Bapepam Rule No. X.D.1 on Mutual Fund Reporting.

classified into any existing business sector and has strong likelihood of violating 1995 No.8 Law on Capital Markets. If the investors are arguably in an indirect or actual shareholder status of the target company, the brokerage of cash flow from a lot of investors to a target company through a stock purchase potentially constitutes illegal establishment of securities exchange or illegal over-the-counter settlement, absent a relevant working permit. Not only that, but also the earning of fees and charges for purchasing stocks may be in violation of the obligation to submit a securities declaration.

Even if it is not in violation of any laws and regulations of the capital market, it still has many legal problems. First, although the investors are not direct shareholders of the target company, the indirect ownership is recognized under Article 25 Paragraph 3 and 3a of BKPM Regulation 6 of 2016. If there is one single foreigner among the investors, the investee and its subsidiaries becomes so-called *PMA* companies directly owned by a foreigner and governed by relevant regulations. *Akseleran* has solved this problem by allowing only Indonesian citizens to register, but this inevitably ends up cutting out a group of investors.

Furthermore, if the above transaction is regarded as a separate and effective business sector, as indicated by the fact that OJK announced in 2017 it would adopt a separate Equity Crowdfunding regulation by end of 2018, as of today investors are placed in a vacuum of protection in the absence of any relevant regulations, particularly given none of the classic legal theories can perfectly capture or explain the relationship between the investors and PT. *Akseleran* in the above structure.

There are several ways to partially explain the legal relationship between the investors and PT. *Akseleran*: (i) a trust relationship between beneficiaries (investors) and a trustee (PT. *Akseleran*); (ii) a proxy relationship between actual shareholders (investors) of the investee and a proxy (PT. *Akseleran*) that exercises certain rights of the shareholders on their behalf; (iii) a creditor-debtor relationship with securities between the creditor (investors) who have a determinable receivables against PT. *Akseleran* at the time they withdraw their investment, and a debtor (PT. *Akseleran*) whose stocks in the target company are secured for the creditors; (iv) a principal-agent relationship between the principal (investors) and agent (PT. *Akseleran*) that carries on administrative and miscellaneous duties on the principal's behalf such as paperwork, registration and notification to the authorities, liaison with the investee, etc.; and

(v) a depositary relationship between depositors (investors) who have a conditional right to claim a refund of deposits and a depositary that provides the stocks in the target company as securities.

The proxy and agency relationships presume that the investors are the actual shareholders. Because Article 33 Paragraph 1 explicitly prohibits stock ownership under a third party's name, PT. Akseleran's model cannot be viewed as either a proxy or agency relationship. It is important to note that shareholders' rights cannot be comprehensively delegated to a third party in Indonesia and thus each agenda to resolve must be specifically stipulated as a power of attorney with a specific time duration. Also, delegation must be easily cancellable by the principal. Neither a power of attorney nor cancellable delegation is found in this case.

Nor are the creditors-debtor relationship with secured stocks and a depositary relationship with secured stocks relevant in this case. In the above transaction, the parties do not satisfy the legal elements to secure stocks as a pledge, which are: (i) an explicit pledge agreement; (ii) granting of stock certificates; (iii) notification to the company; and (iv) listing up the pledgee's name and address in the shareholders list. Unique to Indonesia is that a stock can be secured as a fiduciary mortgage called *fidusia*, because Article 60 Paragraph 1 of Company Act views stock as a movable property (*Benda bergerak*). Not to mention, a fiduciary mortgage protects the secured party stronger than pledge but requires strict formalities that are again inapplicable to PT. Akseleran's model.³⁸

Lastly, those legal theories concerning trust relationships are not widely recognized in Indonesia and thus applying trust relationships from common law to Indonesia is not appropriate and cannot fully protect investors either.

As a result, the legal relationship between the investors and PT. Akseleran does not fall into any classic legal relationship protected under the Civil Code, other existing laws or legal theories. Thus, the investors can only be protected as a contractual party to PT.Akseleran. Then, the fairness of the contract becomes an issue. However, there is no requirement to form a protective standard contract in Equity Crowdfunding as P2P Lending

³⁸ Notarial deeds, Registration on Fiduciary Registry Book (*Buku Daftar Fidusia*) at Fiduciary Registration Office (*Kantor Pendaftaran Fidusia*), etc.

Regulation requires. Naturally, the investors are given little opportunity to withdraw their money and bear the risk of not only a default of the target company but also a default of either PT. Akseleran or the Akseleran business itself.

Given all these factors, the single Equity Crowdfunding model used to date in Indonesia is not only short of incentives or protection for investors, but is also likely to violate the laws and regulations in capital markets.

B.4.4. Diseconomy in Company Law

Equity investment in Indonesian unlisted companies is costly from a legal perspective. Establishing even a micro-size companies requires minimum capital of 10 billion rupiah. Investing in an existing company consumes substantial time, work and costs including creation of notarial deeds, permits from several authorities such as the Ministry of Law and Human Rights and Investment Coordination Board, public notification through a newspaper over 30 days in advance, notice of certain changes to the Ministry of Law and Human Rights, legalization, translation into Indonesian language of every single legal document, etc. This inefficiency is a real problem because one must do all this work even to purchase shares in a micro- or small-sized unlisted company.

Equity Crowdfunding is not nearly as lucrative a business as a private equity or asset management dealing with a huge investment from one who can endure a few years and pay decent fees. It simply assists regular people in injecting a small amount to a small company. Naturally, the above costs overwhelm any benefits from either the investor's or Equity Crowfunder's perspective. Who on earth would invest his money or broker an investment to a project that, to say, demands hundreds of people contribute a total of 1 billion rupiah but to require 10 billion rupiah of minimum capital and several months in consummating the investment. Furthermore, the maximum lending amount in P2P Lending is 2 billion rupiah and most comparable jurisdictions have a certain maximum investment amount for Equity Crowdfunding. If a new OJK regulation requires a similar level of maximum investment, the diseconomy becomes as clear as day. After all, to finance a small amount from many ordinary people, lending is much more economical.

B.4.5. A Study on P2P Lending Regulation

B.4.5.1. P2P Lending Broker

P2P Lending Regulation names a P2P Lending Broker as an “Information Technology-Based Money Lending Services Provider” and defines it as an “Indonesian legal entity that provides, manages, and operates the Information Technology-Based Money Lending Services” (Article 1 Paragraph 6).

A P2P Lending Broker can simply provide precise information and broker lending and cannot participate in P2P Lending as either a lender or borrower (Article 43 Item b). Although a P2P Lending Broker, its establishers and shareholders are all different entities technically speaking, I think that this Article should be interpreted in a way that one cannot establish a P2P Lending Broker to raise money for one’s own project. Additionally, a P2P Lending Broker is not permitted to act beyond being a broker, such as guaranteeing the borrower’s obligations, issuing bonds, recommending a specific lending or billing for a claim (Article 43).

B.4.6. The Types of Permitted Legal Entities

A P2P Lending Broker can only be established as a corporation (*Perseroan Terbatas* or *PT*) or a cooperative (*Koperasi*) (Article 2 Paragraph 2 of P2P Lending Regulation).

In Indonesia, the types of business organizations are limited partnerships (*Persekutuan Perdata*), general partnerships (*Firma*),³⁹ Secret Partnerships (*Commanditaire Vennotschap* or *CV*),⁴⁰ cooperatives and corporations, only the latter two of which are clearly recognized as legal entities. Hence, the requirement to use only a corporation or cooperative structure for P2P Lending is analyzed as the P2P Lending Regulation necessitating a legal entity status that can separately perform an obligation and take responsibility in order to

³⁹ It is unclear whether Firma is a legal entity or not. Albeit it takes a separate responsibility in its commercial acts after registration and public disclosure, some assert that Firma is not a legal entity because the assets of Firma and one of its members are not completely separated. 이승민, “인도네시아 법률해설,” 「한인뉴스」 2016.01, 67쪽.

⁴⁰ *Persekutuan komanditer* (*Commanditarie Vennotschap*: “CV”) is widely misinterpreted as a limited partnership. This is because CVs in European countries are operated as limited partnerships nowadays and its equivalent in the U.S. is also a limited partnership, which is recognized as a legal entity.

conduct a P2P Lending business.

In Japan, secret partnerships (*tokumeikumiai*) are generally used to carry on P2P Lending business in order to avoid registration as stated under the Money Lending Act.⁴¹ On the contrary, there are no secret partnerships running P2P Lending businesses in Indonesia, and on the OJK's registration list, corporations appear to be used in most cases.⁴²

B.4.6.1. Corporations

The Indonesian legal practice of translating *PT* into English as 'limited liability company' often misleads foreigners from common-law countries. In U.S. legal terminology, Indonesia's limited liability company is simply a corporation. A limited liability company in the U.S. normally means a private limited company that combines pass-through taxation of a partnership or sole proprietorship with limited liability, although it may have some variations depending on the state. Also, because *PT* literally means limited (*terbatas*) company (*perseroan*), and a literal translation of both the Korean *yuhan huesa* and Japanese *yuugen kaisha* also means limited company, the term *PT* also often misleads legal minds from South Korea or Japan. Today's *PT* is simply a corporation.⁴³ To be more specific, it is a type of C-corporation since Indonesia does not recognize S-corporations.⁴⁴ This paper, however, uses either company or corporation depending on context.

A foreigner or foreign entity can directly invest only in a corporation (Article 5 Paragraph 2 of 2007 No. 25 Capital Investment Act).

B.4.6.2. Cooperatives

A cooperative refers to "a business body consisting of persons or Cooperative, a legal entity acting socially and economically based on the principle of cooperation and kinship

⁴¹ 左光 敦, P2Pレンディングの仕組みと法規制: 英国のP2Pレンディング規制を中心に, 日本銀行金融研究所/金融研究/2018.1, 116-118面; Son Young Hwa, "A Study on the Reasonable Restrictions on P2P Lending," *Hanyang Journal of Law*, Vol. 27 No.3 (2016) p. 148.

⁴² See Tribunisnis, *supra* note 3.

⁴³ Soonpeel Edgar Chang, *Indonesian Company Law* (Routledge, 2018), p. 155.

⁴⁴ *Ibid.*

(*Gotong-royong*)” (Article 1 Paragraph 1 of 1992 No.25 Cooperative Act).⁴⁵

While having some similarities with corporation in some senses, one being that it constitutes a separate entity and its members have limited liability up to their contribution, its nature is different from the one of corporation in that the governing laws and regulations are very much eased and alleviated. One person one voting right (not one stock one voting right) applies, and it is not open to the public and very private.

Cooperatives had been widely used for microcredit even before P2P Lending appeared, as their main aim was to help people located in the bottom of social pyramid rather than pursuing profits. Particularly in Indonesia, the culture and industry to support the low-income class via cooperatives has been long developed. Around 20% of adults joined at least one cooperative,⁴⁶ and the most common purpose of the more than 200,000 existing cooperatives is savings and lending.⁴⁷ Notwithstanding their different bylaws, the general operation of these cooperative is same. They mandate participation in certain activities, dues or contributions for creation and maintenance of the joint funds, and grant a right to claim benefits related to death, sickness or other efforts. Naturally, insurance enterprises take the largest earning from this system.⁴⁸

Amartha, a P2P Lending Broker specifically specializing in microcredit to improve the life quality of low-income communities, was previously a cooperative (*Koperasi Amartha*)

⁴⁵ As frequently having social goals that they aim to accomplish by investing a proportion of trading profits back into their communities, cooperatives have emerged as an alternative business-entity model after the global economic crisis in 2008. In 2009, for instance, the United Nations adopted Resolution 64/136, Cooperatives in Social Development.

Indonesia adopted their Cooperative Act much earlier, in 1992. A new Cooperative Act enacted in 2012 was declared null and void by Supreme Court in the following year (No.28/PUU-XI2013), because the new act was determined to be against the *Gotong-royong* principle. Naturally, the 1992 Cooperative Act has remained effective and binding so far. In Indonesia, there is saying “from a member, by a member, for a member (*dari anggota, oleh anggota, untuk anggota*)” regarding Cooperatives, which implies its *Gotong-royong* principle for community. Indeed, cooperative functions as a support for community by farming, recycling and doing microcredits.

Cooperatives can not only carry on these social activities but also can do profitable activities. Quite a number of global brands such as Sunkist, Welch’s, Associated Press, FC Barcelona in Spain, Allianz in Germany, and Seoul Milk in Korea are managed by cooperatives. Although Cooperatives can perform profitable activities in Indonesia as well, social activities for communities must be the main purpose in principle.

⁴⁶ Michael Mori and Trevor Zimmer, *Mobilizing Banking for Indonesia’s Poor*, Innovations: Technology, Governance, Globalization, Volume 10 Issue 1-2 (2015) p.105.

⁴⁷ Makarim, & Taira. “Indonesia: The new cooperatives law” (Mondaq, 2013)

⁴⁸ Michael Mori and Trevor Zimmer, “Mobilizing Banking for Indonesia’s Poor” *Innovations Vol.10 No.1-2*, (2015), p. 105

and has changed its entity to a corporation (*PT Amarta Mikro Fintek*) due to the new P2P Lending Regulation and its expansion of P2P Lending business. Also, a new P2P Lending Broker often starts business by providing an online platform for a preexisting offline cooperative.⁴⁹

B.4.7. Limitation on Foreigner Direct Ownership of Businesses

A limitation on foreigner direct ownership of businesses refers to the maximum shareholding percentage that a foreign investor can have in a corporation to conduct certain types of business in Indonesia. In a P2P Lending corporation, a foreign investor can own shares up to 85% either directly or indirectly (Article 3 Paragraph 2 of P2P Lending Regulation). Since a foreign investor can have equity only in a corporation (Article 5 Paragraph 2 of 2007 No. 25 Capital Investment Act), investing in a Cooperative is impossible.⁵⁰

There is a fairness issue among regulations because a foreigner can own 100% of the shares in an e-commerce business, 85% in P2P Lending, and 20% in another Fintech for clearing and retail payment. A limitation on foreign investors depending on a type of business has been frequently changed, and the fairness issue has been also been a perennial problem. Given the scope of this research, the age-old issue regarding a limitation on foreigner's direct ownership in Indonesia is not discussed here.⁵¹

B.4.8. Permits and Minimum Capital

An applicant must register at OJK and obtain a business permit within one year from the registration date of the company.

Any change of shareholders in P2P Lending Broker requires a prior permit from OJK (Article 12) because P2P Lending Regulation recognizes P2P Lending as a financial business and thus wants to examine in advance whether an owner of the business is fully qualified.

⁴⁹ Komida, "Kerjasama Mekar dengan Komida bisa memberdayakan kaum perempuan di desa untuk menjalankan usaha", 1 March 2017.

⁵⁰ If any other type of business organization is used by a foreign investor, such an organization and its equity holders are subject to punishment under Article 34 of 2007 No. 25 Capital Investment Act. In addition, using a nominee or borrowing a name is void *per se* under Article 33 Paragraph 2 of the same Act.

⁵¹ See Soonpeel Edgar Chang, *Op. Cit*

Any cooperative or corporation doing P2P Lending business must have paid-in capital of 1 billion rupiah at least and must increase it to a minimum of 2.5 billion rupiah by the time it applies for a business permit (Article 4 of P2P Lending Regulation).

While many civil-law jurisdictions have abolished the requirement of minimum capital for establishing a corporation, Indonesia has still kept it. Except for certain exceptions depending on the type of business, the minimum paid-in capital is ten billion (BKPM Regulation No.6 Year 2016 concerning Guidelines and Procedures for Investment Principle License) and the founder must show proof that at least 25% has been subscribed and paid (Article 33 Paragraph 1 of Company Act). The minimum capital requirement for establishing a P2P Lending Broker appears to reflect this legal practice.

B.4.9. Management and Employee

A P2P Lending Broker must have (i) an IT expert who has one year or more experience in the IT industry or has a qualifying certificate; and (ii) one or more financial expert as a director and commissioner who has a year or more experience in the financial industry. In addition, a P2P Lending Broker must have its employees train and take a course at OJK.

B.4.9.1. Lender and Borrower

1. Nationality

A borrower must be an Indonesian citizen, while a lender may be a foreigner. (Article 15 of P2P Lending Regulation)

2. Lending Limit: 2 Billion Rupiah

A lending limit refers to the maximum amount that an individual or corporation can borrow via each online P2P Lending platform. In other words, it means a cap on the cumulatively borrowable amount per borrower on the same P2P Lending site. (Article 6 of P2P Lending Regulation) This clause aims to prevent any money lender from losing too much money due to a debtor's default.

The P2P Lending Regulation sets the cap at 2 billion Rupiah (around USD 140,000). The lending limit does not differ whether the lender is an individual, corporate investor or

professional investor. Loans over 2 billion Rupiah that have been already advanced prior to enactment of the P2P Lending Regulation remain effective and binding only until each of those loans expires as previously agreed to.

The reason why the lending limit is imposed on each P2P Lending site is thought to be because there is no central management organization recording all the P2P Lending transactions and thus it is extremely difficult to completely grasp how much a borrower has borrowed through all the P2P Lending Brokers.

The first question is not “what amount is appropriate as a cap?” but “is it appropriate to limit the borrowable amount?” The borrower has the liberty to decide without such a cap in the U.K., where the first P2P Lending business appeared. According to a study in 2007 regarding laws and regulations on P2P Lending over 22 countries in Asia and Africa,⁵² China and Indonesia are only two countries having such a limitation among the 22 selected countries. Even though South Korea also set the same type of limitation through an official guideline after this study had been issued, limiting the borrowable amount seems to not very welcome in the majority of comparable countries.

Moreover, there are other methods to protect lenders, by providing transparency in information and prescreening financial fraudsters. For instance, Kenya has devised an open blacklist under the authority that a P2P Lending Broker can list up any credit borrower in default.⁵³ A variety of information regarding a loan applicant can be analyzed, not only their traditional credit record but also patterns in their portfolio and their personal histories of borrowing and spending. Indeed, P2P Lending Brokers are already assessing each applicant based on flexible conditions such as real income, business experience, sustainability of monthly sales, etc., not just standardized data such as earnings and credit rating.⁵⁴ Automation of this analysis with online data leads to totally different discussions related to use of personal information and big data, and thus this paper does leave this issue out.

The main factors mainly considered in South Korea are the difference in the risk in debt and equity investments into startup companies, the current level of investment in the

⁵² C. Leigh Anderson, et al. “Digital Credit Regulation in Selected Countries in Africa and Asia,” Evan School Policy Analysis and Research, University of Washington (11 April 2017)

⁵³ *Ibid.*

⁵⁴ 이현일, “진화하는 P2P대출 심사 기법,” 한국경제 2017.03.05.

market and the crowdfunding system before setting the cap,⁵⁵ while Indonesia took into account of the following considerations:⁵⁶

a. Current Limit of Credit in Banking Sector

Limit of credit means the maximum lendable amount solely based on a borrower's credit under Article 4 Paragraph 3 Items c and e of 1998 No.10 Bank Act (No.10/30/PBI/2008). Insofar as there is a limit of credit in the preexisting financial industry, putting a similar limit on P2P Lending is inevitable.

b. Customer Basis of the Preexisting Financial Institutions

Indonesia decided 2 billion Rupiah for the maximum borrowable amount in order to maintain the stability of the financial market by letting P2P Lending Brokers avoid any conflict with the preexisting financial institutions, after the discussion with the Ministry of Small-And-Middle Enterprises and Cooperatives, other related Ministries and business parties.

The attendees in the discussion viewed required capital for Indonesian small- and middle-sized enterprises around two to ten billion Rupiah in general and decided to satisfy the demands of those unbanked micro enterprises in need of funds but finding it difficult to attain them from the preexisting financial institutions.⁵⁷⁵⁸

3. Interest Rate

There is no specific limitation on interest rate under the P2P Lending Regulation. Hence, as discussed earlier, the loan agreement made among individuals is governed by the applicable provisions under Book 3 Chapter 13 of Civil Code. There is no separate law concerning an interest limitation. Unjust enrichment under Ordinance of No. 524 of 1938 on Combating Usury may apply instead.⁵⁹

⁵⁵ Korean Financial Supervisory Service, Guideline for P2P Lending Regulation, November 2016.

⁵⁶ Fajar Sulaiman, "Ini Alasan OJK Batasi Pinjaman Fintech P2P Lending Cuma Rp 2 Miliar," *Warta Ekonomi*, 10 January 2017.

⁵⁷ *Ibid.*

⁵⁸ The China Banking Regulatory Commission also views P2P Lending as a small private loan placing a limitation on the borrowable amount at each platform through a Draft Rule for the Chinese Peer-to-Peer Lending Market, enacted December 2015.

⁵⁹ The Ordinance was effectively implemented in the 1950s and the 1960s, when the government adopted a currency devaluation policy to reduce people's purchasing power. The determination of the nominal value of loans at that time was made with a reference to the price of gold before and after the adoption of the devaluation policy. Ibrahim Sjarief Assegaf, et al. "Loans & Secured Financing (Indonesia)" *Law Business Research*

This Ordinance provides that in case of a discrepancy in value between the mutual obligations of the contracting parties that has existed from the onset to such an extent that under the circumstances the disproportions of said obligations are excessive, the judge may, at the request of the prejudiced party or also by virtue of his authority, moderate the obligations of the one party or declare the contract null and void unless it is acceptable to all that consequences of the contract entered into by the prejudiced party had been fully incalculable and that they had not acted in recklessness, inexperience, or under undue pressure. Nonetheless, the implementation of the Ordinance today remains unclear and, in fact, no precedent sets out a specific limit of the interest rate. The limitation of interest rate appears to apply only where a loan agreement does not specify any interest rate, in which case the court will apply the 6 percent ‘default interest rate’ as stipulated in the Indonesian Civil Code, or the average interest rate announced by banks.⁶⁰

B.4.9.2. Operation

1. Escrow Account and Virtual Account

A borrower’s repayment must be maintained in an escrow account (Article 24 Paragraph 1 of P2P Lending Regulation) and a lender’s loan must be kept in a virtual account (Article 24 Paragraph 2). Also, the repayment must be remitted from the borrower’s escrow account to the lender’s virtual account (Article 24 Paragraph 3).

Virtual accounts are essentially non-physical accounts that can be used by a corporation to optimize their working capital processes depending on each customer. According to the official elucidation, this provision aims to prevent a P2P Lending Broker from moving the lender’s money into its own bank account. If a lender’s money is deposited in a P2P Lending Broker’s bank account, it cannot sufficiently protect the lenders, particularly when the P2P Lending Broker becomes insolvent or embezzles. For the sake of protection of lenders, therefore, their money should be entrusted and maintained by banks or other credible financial institutes, preventing the P2P Lending Broker from withdrawing and using it. It also helps the lenders stand in the proper priority in cash collection when a P2P

(August 2017)

⁶⁰ *Ibid.*

Lending Broker cannot maintain the business due to insolvency or for any other reasons.

2. Contractual Terms and Disclosure of Information

A P2P Lending Broker must use a standardized contract with a lender (Article 36) that states contractual number, date, parties, rights and obligations, amount of loan, interest rate, fees, duration, specification of costs, penalty (if necessary) and dispute resolution (Article 19 Paragraph 2), in addition to the procedure for operation such as customer's claims and notification to a money lender (Article 38). The contract cannot stipulate a clause allowing a P2P Lending Broker to unilaterally alter any part of the contract or assignment and transfer of rights and obligation (Article 36 Paragraph 2).

In addition, a P2P Lending Broker must provide a lender with information including an accumulative amount that a loan applicant has borrowed, purpose of loan, agreed interest rate, and term (Article 19 Paragraph 5). Importantly, the personal identification of borrower should not be disclosed.

The direct agreement between a lender and borrower must stipulate conditions about a mortgage, if any. However, the P2P Lending Regulation does not specifically state how detailed the agreement must be regarding the mortgage. It does not require any assessment by a third party, land certificate or registration status, which are particularly important in Indonesian practice. Furthermore, it does not specifically encourage a P2P Lending Broker to voluntarily disclose relevant information so that the borrower's mortgage can be used for the sake of lender's interests in fully considering collectible amounts after the creditors in priority.

All the above information must be provided in Indonesia in a readily legible and intelligible way that can give ease, clarity and understanding to users (Article 32 Paragraph 1).

The above provisions aim to prevent a 'mis-selling' of financial product, that is, the deliberate, reckless or negligent sale of financial services or products in circumstances where the contract or information is either misrepresented, or the product or service is unsuitable for the customer's needs. Nonetheless, the above provisions are thought to be insufficient. A lender needs much more information to review the potential for default, such as the loan applicant's credit, current status of assets and liabilities, job and earnings, arrears history, etc. Not only the information about a lender, but also the data about the P2P Lending Broker itself such as arrears, outstanding loans or cumulative amount of loans is also significant. In order

to fully protect the principle of transparency (Article 29 item a), and the principle that any information must be free from error or misrepresentation (Article 30 and Article 43 item f), the P2P Lending Regulation should have mandated a disclosure of additional information regarding the mortgage, borrower, and P2P Lending Broker.

3. P2P Lending Broker's Use of Private Information

To improve the quality of IT support for P2P Lending services, a P2P Lending Broker can cooperate and exchange data with other P2P Lending Brokers (Article 23). The IT support for P2P Lending here is, inter alia, big data analytics, aggregators, robo-advisors, or block chains (Official elucidation of Article 23).

This is where P2P Lending shows a sharp difference from the preexisting financial institutions, as it uses big data and other technologies to assess the credibility of loan applicants. This method became available because P2P Lending is based on the internet, which maintains a variety of information beyond the traditionally recognized data and calculates certain values quicker and more accurately. Nevertheless, if P2P Lending Brokers are permitted to freely share and exchange information and use big data, another issue can be raised regarding rights to privacy. Also, it may conflict with the confidentiality obligations of P2P Lending Brokers (Article 26). This paper leaves discussion of these issues out.

4. Reports to OJK

To secure practical utility of the P2P Lending Regulation, P2P Lending Brokers are required to submit monthly and annual reports to the OJK (Article 44) that detail certain types of information as stipulated under Articles 45 and 46. This is done to give the OJK the authority and power to supervise P2P Lending Brokers and obligate it to regularly check whether the P2P Lending Regulation is being observed.

The P2P Lending Regulation grants the power to impose administrative sanctions on a P2P Lending Broker for a violation of obligations and prohibition in the form of written warnings, penalties, limited access to business activities and revocation of licenses (Article 47).

5. Data Center and Safeguarding Systems

A P2P Lending Broker must set up and maintain a data center and safeguarding systems in Indonesia. This center must satisfy the minimum standard of IT risk management, IT safeguards and resistance to system faults and failure. The safeguards here refer to the

procedures for and means of preventing and mitigating threats and attacks that result in faults, failure, and loss. Further, P2P Lending Brokers must supervise IT vulnerability in support of the security of information (Article 25 and 28).

According to the Indonesian central bank, the vulnerability of sensitive financial information due to cyber-attacks like hacking is a significant risk to address in adopting the regulatory sandbox for Fintech.⁶¹

Moreover, a P2P Lending Broker must provide an audit trail of the whole of its activities (Article 27). An audit trail is a system that traces the detailed transactions to any item in an accounting record or any changes that have been made to a database or file. That is, it includes all the detailed information such as when a certain transaction was made, who made it and what was the type of transaction. The audit in audit trails does not necessarily mean external financial audits only, but includes any other transactions.

As information is computerized and automated, the audit trail is significantly reduced thereby making trace of information much more difficult. The above provision is thought to prevent P2P Lending Businesses from making a vacuum of transactional information.

C. Conclusion

The P2P Lending Regulation seems excellent in protecting interest holders as it defines the P2P Lending business in a clear and simple form and clarifies the legal status of the parties. Particularly, it is surprising that it had an accurate picture of every important point, such as the maximum lending amount, mandatory conditions for contract and information disclosure, when many countries had not adopted a formal laws or regulations at all (e.g., China, South Korea, Brazil and Egypt), or had adopted regulations that vary greatly among countries such as the U.S. style, U.K style, a type that regulates P2P Lending business as an intermediary (Australia, Canada and New Zealand), a type that regulates P2P Lending business as a bank (Germany, Italy and France) and outright prohibition (Israel).⁶² As discussed earlier, however, there are some parts to improve, such as disclosure of certain information in detail, a differentiated cap depending on the type of lender or whether a

⁶¹ Bank Indonesia, “Kajian Stabilitas Keuangan No. 28” (March 2017), p. 175

⁶² 서영미, *국내외 P2P 대출중개업 관련 규제 동향 및 시사점*, 금융투자협회, 5 August 2015, p. 2.

mortgage is provided.

Undoubtedly, crowdfunding is a new, alternative system of finance for those who have difficulty in borrowing money from existing financial institutions. Nonetheless, misuse of these businesses is highly problematic as any damage can spread over many ordinary investors or lenders. This risk is particularly worrisome in Indonesia, where financial exclusion is high and a specific regulation or effective supervisory system against property speculation or pyramid schemes has not developed. Although there are strong P2P Lending Brokers with a low delinquency rate, poor online platforms with liquidity difficulties or financial frauds are highly likely to appear, given the number of P2P Lending Brokers cropping up like mushrooms after a rain. Thus, having a good supervisory system cannot be emphasized enough.

On the other hand, Equity Crowdfunding has not developed in Indonesia and it needs to study how to weave an appropriate regulatory frame to encourage this alternative. Nevertheless, the more important study must be conducted ahead: how it can solve the inefficient time and cost problems in company law, and potential violations against the laws and regulations in the capital market. The time, cost and administrative work currently required under company law are excessive for micro and small companies who need small amounts financed from the general public. If this problem cannot be efficiently resolved, the Equity Crowdfunding industry will exist somewhere else than Indonesia.

BIBLIOGRAPHY

Laws and Regulations

Burgerlijk Weboek voor Indonesia (Undang-Undang Ukum Perdata)

Undang-undang No.42 1999 tentang Jaminan Fidusia

Undang-undang No.25 2007 tentang Penanaman Modal

Geldeschieters Ordonantie. S.1938-523 (Undang-undang Pelepas Uang)

Woekerordonnantie 1938, Stb. 1938 No. 524

Bapepam Rule No. IX.C.4 on Registration Statement for a Public Offering of an Investment

Fund in the form of a Corporation

Bapepam-LK Rule No. IX.C.5 on Registration Statement for a Public Offering of an Investment Fund in the form of a Collective Investment Contract

Bapepam Rule No. IX.C.6 on Form and Content of a Prospectus for a Public Offering of an Investment Fund

Bapepam Rule No. IV.A.1 on Application Procedures for Obtaining a Business License as a Corporate Investment Fund;

Bapepam Rule No. IV.A.2 on Guidelines for Articles of Association of a Corporate Investment Fund

Bapepam Rule No. IV.A.3 on Management Guidelines of a Corporate Investment Fund

Bapepam Rule No. IV.A.4 on Guidelines of Management Contracts of a Corporate Investment Fund

Bapepam Rule No. IV.A.5 on Guidelines of Custodian Contracts of Corporate Investment Fund's Assets

Bapepam-LK Rule No. IV.B.1 on Guidelines for the Management of Investment Fund in the form of Collective Investment Contracts

Bapepam-LK Rule No. IV.B.2 on Guidelines for Contract of Investment Fund in the form of the Collective Investment Contracts

Bapepam-LK Rule No. IV.B.3 on Exchange Traded Fund

Bapepam Rule No. X.D.1 on Mutual Fund Reporting

Peraturan Otoritas Jasa Keuangan Nomor 77/POJK.01/2016 tentang Layanan Pinjam Meminjam Uang Berbasis Teknologi Informasi

Legal documents

C. Leigh Anderson, et al. "Digital Credit Regulation in Selected Countries in Africa and Asia," Evan School Policy Analysis and Research, University of Washington (11 April 2017).

Dong Won Ko, "Legal Review on Peer-to-Peer Lending in Korea," Korean Journal of Banking and Financial Law, Vol. 8 No. 2, Korean Banking and Financial Law Association (November 2015).

Min Seop Yun, “A Legal Study on the Crowdfunding as Means of Obtaining Capital,” Korean Journal of Business Law, Vol. 26 No.2, Korean Business Law Association (2012).

Min Seop Yun, “A Legal Study on the Lending Model Crowdfunding,” Korean Journal of Banking and Financial Law, Vol. 6 No. 2, Korean Banking and Financial Law Association (November 2013).

Seong, Hye Hwal, “A Study on the Regulatory Framework for the Equity Crowdfunding,” Korean Journal of Securities Law Vol.14, No.2, Korea Securities Law Association (2013).

Son Young hwa, “A Study on the Reasonable Restrictions on P2P Lending,” Hanyang Journal of Law, vol. 27 No.3 (2016).

Soonpeel Edgar Chang, Indonesian Company Law, Routledge (2018).

석지웅, 증권형 크라우드펀딩제도 (온라인소액투자중개) 도입현황 및 시사점, 정보통신방송정책, 제28권 10호 통권 624호.

左光 敦, P2Pレンディングの仕組みと法規制：英国のP2Pレンディング規制を中心に, 日本銀行金融研究所/金融研究/2018.1.

Articles

Bank Indonesia, “Kajian Stabilitas Keuangan No.28” (March 2017).

Crowd Institute, “Peer to Peer Finance Growth Report” (11 January 2018): <http://post.naver.com/viewer/postView.nhn?volumeNo=12010273&memberNo=30452953&navigationType=push>, accessed on 28 February 2018.

Dodi Esvandi, “Baru 32 Fintech P2P Lending yang Terdaftar di OJK,” *Tribunbisnis* (31 January 2018): <http://www.tribunnews.com/bisnis/2018/01/31/baru-32-fintech-p2p-lending-yang-terdaftar-di-ojk>, accessed on 28 February 2018

European Commission, “Financial Services Provision and Prevention of Financial Exclusion” (March 2008).

Grameen Foundation “Assessing the role of cooperatives in mobile financial services in Indonesia” (2014).

Ibrahim Sjarief Assegaf, et. al. “Loans & Secured Financing (Indonesia),” *Law Business Research* (August 2017):

<https://gettingthedealthrough.com/area/79/jurisdiction/42/loans-secured-financing-indonesia/> accessed 28 February 2018..

International Monetary Fund, “IMF Country Report No.17/152, Indonesia,” (June 2017)

Jason Ekberg, et.al. “Time for Marketplace Lending Addressing Indonesia’s Missing Middle,” Oliver Wyman (2016)

Korea Development Bank, 중국P2P대출규제 강화와 향후전망, Weekly KDB Report, 5 (September 2016).

Michael Mori and Trevor Zimmer, “Mobilizing Banking for Indonesia’s Poor,” *Innovations*, Vol.10 No.1-2. (2015).

이승민, “인도네시아 법률해설,” 「한인뉴스」(January 2016).

서영미, 국내외 P2P 대출중개업 관련 규제 동향 및 시사점, 금융투자협회 (5 August 2015).

P2P 대출 가이드라인 제정 방안. 금융위원회 금융감독원 (November 2016).

Newspaper

Achmad, “*Ivan Nikolas Tambunan, Co-Founder dan CEO Akseleran: Selalu Ingin Bantu Usaha Kecil*,” *Koran Jakarta* (02 December 2017).

Alisha Sulisto, “Who owns Fintech?” *the Jakarta Post* (13 December 2016)

Antonia Timmerman, “Indonesia comes out with regulations for P2P lending platforms,” *Deal Street Asia* (05 January 2017).

Dinda Audriene Muthmainah, “Mitigasi Risiko, OJK Siapkan Beleid Equity Crowdfunding,” *CNN Indonesia*, (17 November 2017).

Fransiska Nangoy et. al. “Indonesia’s fintech lending boom exploits shortfall in bank loans,” *Thomson Reuters* (30 January 2018).

Fajar Sulaiman, “*Ini Alasan OJK Batasi Pinjaman Fintech P2P Lending Cuma Rp 2 Miliar*,” *Warta Ekonomi* (10 January 2017): <https://www.wartaekonomi.co.id/read126944/ini-alasan-ojk-batasi-pinjaman-fintech-p2p-lending-cuma-rp2-miliar.html>, accessed 28 February 2018.

Jonathan Keane, “Indonesia is Priming Itself for a Fintech Future” *IDG* (9 December 2015):

<http://www.idgconnect.com/abstract/10696/indonesia-priming-fintech-future>, accessed 28 February 2018.

Julian Sukmana Putra, 'Bursalde.com, the First Indonesian Crowdfunding Site,' *TechinAsia* (4 April 2011): <https://www.techinasia.com/bursaide-com-the-first-indonesian-crowdfunding-site> accessed 28 February 2018.

Komida, 'Kerjasama Mekar dengan Komida bisa memberdayakan kaum perempuan di desa untuk menjalankan usaha' (1 March 2017): <http://mitradhuafa.com/?p=108> accessed 28 February 2018.

Lee, "Banks, the Reason why they go to Indonesia," *The Kyunghyang Shinmun* (14 April 2010): http://biz.khan.co.kr/khan_art_view.html?artid=201004141759195&code=920301 accessed 28 February 2018.

Makarim, & Taira. "Indonesia: The new cooperatives law" *Mondaq* (2013): <http://www.mondaq.com/x/237616/Financial+Services/The+New+Cooperatives+Law>, accessed 28 February 2018.

Nadine Freischald, 'Five crowdfunding sites in Indonesia', *TechinAsia* (1 May 2015): <https://www.techinasia.com/bursaide-com-the-first-indonesian-crowdfunding-site>, accessed 28 February 2018.

Oxford Business Group, "Indonesian FinTech Start-ups Raise Stakes for Banks" (15 June 201): <http://www.oxfordbusinessgroup.com/news/indonesian-fintech-start-ups-raise-stakes-banks>, accessed 28 February 2018.

Roh "Korean Finance sprouts on the landmark in the center of Jakarta" *Hankyung* (6 August 2015).

Ridhi Khaltan, "these 6 Foreign Companies are the Biggest Shareholders in Indonesia's Banks," *Frontera News* (03 December 2017).

이현일, "진화하는 P2P대출 심사 기법," *한국경제* (05 March 2017).