Regulating Equity Crowdfunding in Indonesia

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Abstract

The equity crowdfunding industry has grown significantly in recent years in many countries around the world which provides capital to start-up and small and medium business enterprises (SMEs) at the early stages of their development. To benefit from crowdfunding, the World Bank suggests that developing countries should remove the barriers to its development and, if necessary, change the laws and regulations to enable it. As a result, several developing countries, including Indonesia, have introduced equity crowdfunding regulation to address entrepreneurs' unmet need for capital that cannot be adequately served by the existing funding bodies such as banks, lending financial institutions, angel investors and venture capitals. Legislative reforms in crowdfunding in advanced countries may serve as the stepping stone in assisting developing countries to regulate their equity crowdfunding industries.

Although transplanting regulatory framework from developed countries are common and have been advocated by the World Bank as good practice to improve the business environment in developing countries, however, a mechanical 'legal transplant' without adaption to the institutions of the host country may be ineffective and fail due to resistance and reluctance of stakeholders to support implementation of this policy. Different levels of economic development, complexity, and maturity of economic institutions, as well as different legal and regulatory systems, are problems that need to be addressed by policymakers in developing countries if new policies are to be successfully adapted and implemented.

To mitigate these challenges, this thesis analyses whether the current expansion of equity crowdfunding regulation in advanced countries is suitable for Indonesia as a developing country. This research aims to fill the gap between the national economic need for specific regulations to support equity crowdfunding and industry need for legal certainty and better regulation of equity crowdfunding in Indonesia.

This thesis employs two research methods. Firstly, it uses qualitative methodology to understand the development of start-up funding in Indonesia. Semi-structured interviews were conducted to understand the perceptions and experience of government, venture capital, angel investor, and start-up company stakeholders. They were also asked about the new equity crowdfunding regulation in Indonesia, their understanding of the regulatory barriers and what made them confident about investing

capital in equity crowdfunding. There are very few studies focusing on the role of venture capitals, angel investors and equity crowdfunding in start-up funding in Indonesia; therefore, this thesis is among the first to explore this area.

The second method uses a comparative law approach to examine issues identified in this study concerning the barriers in existing laws and regulations and to determine how different legal systems solve the same problem. Such analysis can enable refinement of existing regulation.

This study contributes to knowledge in several ways. First, investing in start-up companies is generally linked with discussion of agency theory, information asymmetries, and the start-up stages of funding. This study contributes to these theories by enriching their implementation in equity crowdfunding, especially in Indonesia. It also contributes to the discussion of legal transplant theory within the Indonesian context by borrowing and adapting equity crowdfunding regulation from developed countries. From this perspective, the thesis provides suggestions for policymakers on how the process of adapting regulation from advanced nations to developing countries can be achieved and made more effective in the implementation process. In addition, the research is innovative in adopting a process view which focuses on answering the why and how equity crowdfunding regulation may work and complements the outcome perspectives of crowdfunding in the existing literature.

Student Declaration

"I, Ceceh Harianto, declare that the PhD thesis entitled 'Regulating Equity Crowdfunding in Indonesia' is no more than 100,000 words in length including quotes and exclusive of tables, figures, appendices, bibliography, references and footnotes. This thesis contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or diploma. Except where otherwise indicated, this thesis is my own work".

Signature: Date:

Ceceh Harianto 14 August 2020

List of Publications and Conferences

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Harianto, Ceceh; Li, Yongqiang 2017, 'Regulating Equity Crowdfunding in Indonesia' (Australia & New Zealand Academy of Management 2017, Melbourne, Australia)

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List of Abbreviations

ADRI	anti-director rights index
ANGIN	The Angel Investor Indonesia Association
ASIC	The Australian Securities and Investments Commission
B2B	business to business
BEKRAF	*Badan Ekonomi Kreatif* [Economic Creative Agency]
BEKUP	Bekraf for Pre-start-up Program
BKPM	*Badan Koordinasi Penanaman Modal* [the Investment Capital Coordinating Board]
CAS	company appraisal service
CEO	chief executive officer
COB	conduct of business regulation
CSEF Act	Crowd-sourced Equity Funding Act
CSR	corporate social responsibility
EBITDA	earnings before interest, taxes, depreciation, and amortization
ECF	equity crowdfunding
ECMH	the efficient capital market hypothesis
EGCs	emerging growth companies
EU	The European Union
FINRA	The Financial Industry Regulatory Authority
FSA	The Indonesian Financial Services Authority
GATT	the general agreement on tariffs and trade
GDP	gross domestic product
IMF	The International Monetary Fund
IOSCO	The International Organization of Securities Commission
IPO	initial public offering
IPR	intellectual property rights

IT	information technology
JOBS Act	the Jumpstart Our Business Start-ups Act
KYC principle	know your customer principle
LDC	least developing countries
LLS	La Porta, Lopez-de-Silanes, and Shleifer
LLSV	La Porta, Lopez-de-Silanes, Shleifer, and Vishny
MSMEs	micro, small and medium enterprises
MVP	minimum viable product
NGOs	non-governmental organisations
NSECHR	The National Statement on Ethical Conduct in Human Research
OECD	The Organisation for Economic Co-operation and Development
P2B	peer-to-business
P2P	peer-to-peer
PPBT	*Perusahaan Pemula Berbasis Teknology* [Technology Based Start-up Companies]
PPM	private placement memorandum
PSP	private sector participation
PwC	The Price Waterhouse Coopers
SEC	The Securities and Exchange Commission
S&P	Standards and Poor
SMEs	small and medium enterprises
SOP	standard operating procedure
SPC	special purpose company
TRIPS	The Agreement on Trade-Related Aspects of Intellectual Property Rights
UK	The United Kingdom
US	The United States of America
UUD 1945	*Undang-undang Dasar 1945* [The Constitution of The Republic of Indonesia]

VCs	venture capitals
WTO	The World Trade Organization

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Chapter 1 : Introduction

1.1 Background and Aims of Study

Crowdfunding has expanded rapidly in several developed economies such as the United States (US), the European Union (EU), the United Kingdom (UK), Canada, Hong Kong, Singapore and Australia. Although its volume is currently relatively small compared with funding from conventional financial sources, such as banks or capital markets, there has been exponential growth in the total amount of financing from crowdfunding worldwide.[1] In 2014, the overall funding volume from crowdfunding was more than US$16.2 billion (A$21.7 billion) globally, a substantial increase from only US$0.8 billion (A$1.07 billion) in 2010, US$2.5 billion (A$3.35 billion) in 2012, US$6.1 billion (A$8.18 billion) in 2013, and is projected to accumulate more than US$28 billion (A$39 billion) by the 2025.[2] Since its operation from 2009 to October 2019, Kickstarter, one of the leading reward crowdfunding platforms in the US, has facilitated 172,457 successfully funded projects, raised US$4.6 billion ($A6.6 billion) and achieved a 37.4% success rate.[3] In Europe, in 2016 the funding volume of reward-based crowdfunding reached more than €191m ($A309m) with annual growth from 2015 of 37%; at the same time the figure for equity crowdfunding was €219m (A$354m) for which the annual increase was 97%, and donation crowdfunding was €32 (A$51m) with yearly growth of 33%.[4]

While regulation of crowdfunding is vital for the development of individual businesses within the European Union, there has been no attempt at the cross-jurisdictional harmonization of relevant regulation. The European Commission has noted that crowdfunding's appropriate regulation would extend its potential as an essential source of funding for small and medium enterprises (SMEs).[5] However, there has been

[1] Paul Belleflamme, Nessrine Omrani and Martin Peitz, 'The Economics of Crowdfunding Platforms' (2015) 33 *Information Economics and Policy* 11, 11.

[2] Ibid; Market Study Report LLC, 'Global Crowdfunding Market to Exceed USD 28.77 Billion by 2025', APNews (online, 9 December 2019) <https://apnews.com/Newswire/278cd583cea2d5d4582d07495eb9208c>.

[3] Kickstarter, 'Stats', <https://www.kickstarter.com/help/stats?ref=global-footer>.

[4] Tania Ziegler et al, *Expanding Horizons: The 3rd European Alternative Finance Industry Report* (Industry Report, Cambridge Centre for Alternative Finance, University of Cambridge, 2018) 29.

[5]. European Commission, 'Capital Markets Union: Commission Supports Crowdfunding as Alternative Source of Finance for Europe's Start-ups' (Press release, Brussel, 3 May 2016) <http://europa.eu/rapid/press-release_IP-16-1647_en.htm?locale=en>.

no apparent urgency to increase the framework for crowdfunding provision or regulation at the EU level.[6]

Based on a survey of twenty-three International Organization of Securities Commission Organization (IOSCO) members, the IOSCO concluded that the crowdfunding industry is still in its infancy in most countries and a common international approach to supervision has not yet been proposed.[7] In developing countries[8], crowdfunding has gained increasing popularity and is regarded as a success. It is estimated by the World Bank that by 2025 there will be approximately US$100 million (A$135m) worth of crowdfunding investment in developing countries.[9]

In contrast to developed countries, crowdfunding in Indonesia is still in its early phase.[10] On 31 December 2018, the Indonesian Financial Services of Authority (FSA) issued a regulation on equity crowdfunding.[11] Between that date and October 2019, the FSA approved just two equity crowdfunding platforms to operate in Indonesia[12], although up to September 2019, nine companies had sought a license from the FSA.[13] On

[6] Ibid.

[7] Board of the International Organization of Securities Commissions (IOSCO), *Crowdfunding: 2015 Survey Responses Report* (Report, FR29/2015, December 2015) 28.

[8] The World Bank classification of developed economies, transition economies, and developing economies is 'intended to reflect the basic economic country conditions' and is based on several categories. One of the important indicators is Gross National Income (GNI) per capita. The least developed countries are classified based on the decision of the United Nations Economic and Social Council after considering the Committee for Development Policy's recommendation. See United-Nations, *World Economic Situation and Prospects 2014* (Report, New York, 2014) <https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/2013/12/WESP2014.pdf>.

[9] Alice Budisatrijo and Maria Karienova, '10 Steps to Successful Crowdfunding' (article, 16 November 2016) <http://www.id.undp.org/content/indonesia/en/home/presscenter/articles/2016/11/16/10-steps-to-successful-crowdfunding.html>.

[10] Albert Santos, 'Update: Crowdfunding in Indonesia' (article, 26 August 2015) <https://www.crowdfundinsider.com/2015/08/73370-update-crowdfunding-in-indonesia/>.

[11] *Peraturan OJK No. 37/POJK.04/2018 tentang Layanan Urun Dana Melalui Penawaran Saham Berbasis Teknologi Informasi [Indonesian FSA Regulation No. 37/POJK.04/2018 on Equity Crowdfunding]* (Indonesia) <https://www.ojk.go.id/id/regulasi/Documents/Pages/Layanan-Urun-Dana-Melalui-Penawaran-Saham-Berbasis-Teknologi-Informasi-%28Equity-Crowdfunding%29/POJK%2037%20-%202018.pdf>.

[12] Indonesian FSA, '*OJK Keluarkan Izin Penyelenggara Layanan Urun Dana Berbasis Teknologi Informasi'* ['Indonesian FSA has released licence to equity crowdfunding platforms'] (Press Release, SP 43/DHMS/OJK/IX/2019, 24 September 2019) <https://www.ojk.go.id/id/berita-dan-kegiatan/siaran-pers/Pages/Siaran-Pers-OJK-Keluarkan-Izin-Penyelenggara-Layanan-Urun-Dana-Berbasis-Teknologi-Informasi-(Equity-Crowd-Funding)-.aspx>.

[13] Syahrizal Sidik, '*9 Perusahaan Ajukan Izin Equity Crowdfunding di OJK* [9 companies apply for equity crowdfunding platform licenses to the Indonesia FSA]', CNBC Indonesia (online, 23 September 2019) <https://www.cnbcindonesia.com/market/20190923140202-17-101460/9-perusahaan-ajukan-izin-equity-crowdfunding-di-ojk>. See also Indonesian FSA, '*Daftar Platform Equity Crowdfunding yang Telah Mendapatkan Izin dari OJK Per 31 Desember 2019'* ['List of Platforms that Received License from the Indonesian FSA per 31 December 2019'] (Publikasi, 8 January 2020) <https://ojk.go.id/id/berita-dan-kegiatan/publikasi/Pages/Daftar-Platform-Equity-Crowdfunding-yang-Telah-Mendapatkan-Izin-dari-OJK-Per-31-Desember-2019.aspx>.

the other hand, peer-to-peer (P2P) lending (lending crowdfunding)[14] in Indonesia has grown significantly since the Indonesian FSA issued the regulation in 2016.[15] There have been more than 120 licensed P2P lending platforms established by early August 2019.[16] Based on a 2019 Price Waterhouse Coopers (PwC) report, P2P lending has contributed to micro, small and medium enterprises' (MSMEs) access to credit worth Rp4.3 trillion (A$445 million)[17], and this new credit source provided access to credit for MSMEs and individuals of Rp49.7 trillion (A$5.14 billion) in 2018.[18]

Although the Indonesian FSA has issued a regulation on equity crowdfunding, several issues potentially inhibit its development. The market for P2P lending in Indonesia existed before regulation in this area. In general, the laws in Indonesia do not prohibit lending and borrowing between two or more parties. Before the FSA regulation, people could legally provide P2P lending platform services and facilitate lending and borrowing between users. The FSA regulation was then issued to protect the users from potential fraud, to anticipate money laundering, and to maintain the stability of the financial system from the activities of the P2P platform.[19] The FSA was interested in regulating P2P lending after it became increasingly influential for many people and firms, and the financial system more generally. There had been sufficient time for the FSA and stakeholders to learn from the market about how P2P lending operated and they could

[14] Lending crowdfunding or peer-to-peer (P2P) lending is an online market where individual lenders provide loans to individual borrowers through an internet platform that acts as an intermediary. See Lin Mingfeng, Nagpurnanand R. Prabhala and Siva Viswanathan, 'Judging Borrowers by the Company They Keep: Friendship Networks and Information Asymmetry in Online Peer-to-Peer Lending' (2013) 59(1) *Management Science* 17, 17. The original lending crowdfunding platform is Zopa.com, which was launched in 2005 in the UK. See Craig R. Everett, 'Origins and Development of Credit-based Crowdfunding' (2019) 11(2) *Banking and Finance Review* 21, 24.

[15] *Peraturan OJK No. 77/POJK.01/2016 tentang Layanan Pinjam Meminjam Uang Berbasis Teknologi Informasi [Indonesian FSA Regulation No. 77/POJK.01/2016 on Financial Loan Services Based on Information Technology]* (Indonesia) <https://www.ojk.go.id/id/regulasi/otoritas-jasa-keuangan/peraturan-ojk/Documents/Pages/POJK-Nomor-77-POJK.01-2016/SAL%20-%20POJK%20Fintech.pdf>.

[16] Redaksi CNBC Indonesia, '*Kian Ramai, Ini 128 Fintech Terdaftar & Berizin dari OJK* [There are 128 registered and licenced Fintech from the FSA]', CNBC Indonesia (online, 12 August 2019) <https://www.cnbcindonesia.com/tech/20190813183001-37-91780/kian-ramai-ini-128-fintech-terdaftar-berizin-dari-ojk>.

[17] PwC Indonesia, 'Indonesia's Fintech Lending: Driving Economic Growth Through Financial Inclusion' (Report, June 2019) 24 <https://www.pwc.com/id/en/fintech/PwC_FintechLendingThoughtLeadership_ExecutiveSummary.pdf>.

[18] Kontan.co.id, '*AFPI: Bakal Ada 45 Entitas Fintech P2P Lending Baru yang Mendaftar ke OJK* [AFPI: There will be Another New 45 P2P Fintech Lending who will File for Licence to the FSA]' (online, 24 September 2019) <https://keuangan.kontan.co.id/news/afpi-bakal-ada-45-entitas-fintech-p2p-lending-baru-yang-mendaftar-ke-ojk?page=all>.

[19] *Indonesian FSA on Financial Loan Services Based on Information Technology* (Indonesia) (n 15).

anticipate the challenges for regulation based on the existing environment of P2P lending in Indonesia.

However, equity crowdfunding is generally prohibited under the existing capital market regulatory regime. Offering securities to more than 100 people or using the mass media or electronic media such as the internet, or selling securities to more than 50 people, is considered a public offering of securities and requires a registration statement to the Indonesian FSA, complying with the disclosure and prospectus regulation under the Capital Markets law, and with any subsequent requirements after the registration statement.[20] The only exception to this rule is a securities offering of less than Rp1 billion (A$100,000) in a year.[21] This amount is considered too low to facilitate adequate equity capital for start-ups via equity crowdfunding in Indonesia. A crowdfunding platform in Indonesia, Akseleran, announced the launch of an equity crowdfunding platform on 21 March 2017 after introducing the beta version[22] of the portal in December 2016.[23] Because of practical business considerations and regulatory concerns, Akseleran changed its focus from an equity crowdfunding platform to a P2P crowdfunding platform.[24]

Consequently, when the Indonesian FSA started to regulate equity crowdfunding it did not exist in Indonesia. Therefore, the drafting of the regulation was mainly based on existing regulation in securities offering and input from stakeholders, as well as a brief comparison of equity crowdfunding regulation from other countries. This approach is a common step in Indonesia when drafting a new regulation. However, there are questions that need to be carefully analysed to ensure that regulation can effectively facilitate the business: firstly, whether the current regulation of equity crowdfunding has

[20] See *Undang-undang No. 8 Tahun 1995 tentang Pasar Modal [Law No. 8 of 1995 on Capital Market Law]* (*Indonesia*) article 1 number 15 and number 19, articles 70 and 78.

[21] *Peraturan OJK No. 26/POJK.04/2020 tentang Penawaran yang Bukan Merupakan Penawaran Umum [Indonesian FSA Regulation No. 26/POJK.04/2020 on Exception of Public Offering*' (Indonesia) <https://www.ojk.go.id/id/regulasi/Documents/Pages/Penawaran-yang-Bukan-Merupakan-Penawaran-Umum/POJK%2026-2020.pdf>.

[22] Beta version is 'a field test of the beta version of a product (such as software) especially by testers outside the company developing it that is conducted prior to commercial release'. See Merriam-Webster, 'Definition of Beta Test' (*Dictionary*) <https://www.merriam-webster.com/dictionary/beta%20test>.

[23] Ivan Tambunan, '*Akseleran Resmi Meluncurkan Secara Penuh Portal Equity Crowdfunding Pertama di Indonesia'* ['Akseleran Formally Announced The First Equity Crowdfunding Portal in Indonesia'] <https://www.akseleran.co.id/blog/akseleran-resmi-meluncurkan-secara-penuh-portal-equity-crowdfunding-pertama-di-indonesia/>.

[24] Ivan, Tambunan, '*Akseleran Resmi Terdaftar dan Diawasi Oleh OJK'* [Akseleran Formally Registered and Supervised by the Indonesia FSA] (blog post, 22 June 2017) <https://www.akseleran.co.id/blog/akseleran-resmi-terdaftar-dan-diawasi-oleh-ojk/>.

facilitated the interests of the stakeholders in Indonesia and secondly, to what extend should Indonesia borrow and adapt the regulation of equity crowdfunding from advanced countries.

Based on the contextual issues outlined above, this project has three aims:

a. To identify and critically evaluate barriers in existing laws and regulations in Indonesia for the development of equity crowdfunding;
b. To develop a better regulatory environment for the development of equity crowdfunding in Indonesia; and
c. To propose regulatory reform to guide policy implementation in Indonesia.

1.2 Contribution to Knowledge and Statement of Significance

1.2.1 Contribution to knowledge (academic contribution)

1. The relevant laws and regulations in Indonesia do not meet the needs of business or stakeholders. The need to regulate equity crowdfunding has been acknowledged by the Indonesian government. How the current regulation of equity crowdfunding can be developed to better meet the needs and interests of stakeholders are issues requiring detailed research.
2. This research contributes to filling the gap by developing a specific regulation that accommodates the interests of equity crowdfunding stakeholders based on information asymmetry theory, agency theory, and stages of funding theory.
3. The use of comparative law in this study can be considered as an intellectual and theoretical exercise to address the appropriateness of adapting foreign regulations on equity crowdfunding to the business context of Indonesia.
4. The existing literature has been predominantly focused on the outcome of equity crowdfunding. The process of equity crowdfunding is yet to be addressed due to the limited availability of data. This study is the first to collect primary data with a particular focus on the process of the equity crowdfunding regulation. The process view will complement the outcome view of the implementation of the equity crowdfunding by enriching traditional wisdom of how crowdfunding performs and how stakeholders respond to crowdfunding regulations, which has both theoretical and practical significance.

1.2.2 Statement of significance (practical contribution)

1. This research contributes to the development of equity crowdfunding in Indonesia by providing insights from relevant ministries, agencies and professional associations in Indonesia, including the Indonesian FSA, the Ministry of Co-operative and Small and Medium Enterprise, the Ministry of Finance, the Ministry of Communication and Informatics, as well as venture capitals and business practitioners.
2. The approach adopted in this study is a practical application of the legal transplant theory and extending this theory to the Indonesian context, which may also be relevant to other developing countries.

1.3 Research Questions

The research questions for this project are:

1. What factors can boost the confidence of stakeholders in Indonesia to participate in equity crowdfunding?
2. What are the barriers in existing practice, laws and regulations in Indonesia to the development of equity crowdfunding?
3. What new legal regulation or actions from other developed nations would enhance the adoption of equity crowdfunding regulation in Indonesia?

1.4 Research Methodology

This thesis adopts both a qualitative research and comparative law method. The qualitative method uses semi-structured in-depth interviews to understand the perceptions, experiences, and opinions of the participants; firstly, to understand factors affecting the confidence of the participants about equity crowdfunding and secondly, to explore the legal barriers and challenges to adopting equity crowdfunding from advanced countries and recommending legal and regulatory mechanisms that will enable it to reach its potential in Indonesia.

The comparative method used in this study analyses how the regulation in developed countries solved problems in regulating equity crowdfunding. Finding the similarities and differences of the regulation in Indonesia and several developed countries is useful to broadening the perspective of how Indonesia can solve similar problems in regulating equity crowdfunding.

1.5 Structure of the Thesis

This thesis comprises nine chapters. Chapter 1 introduces the background and aim of the study, explains its contribution to knowledge and outlines the research question.

Chapter 2 presents a literature review on both equity crowdfunding and legal transplant and identifies the research gaps in the literature.

Chapter 3 explains the context for this study; it outlines the role of regulation in common law countries and provides a brief description of the Indonesian legal system.

Chapter 4 explains the conceptual framework which illustrates how the interconnection between equity crowdfunding regulation, the understanding of the theories, and the development of the conceptual framework of equity crowdfunding in practice and regulation.

Chapter 5 describes the methodologies used in this study. It outlines the qualitative research design which includes the sampling, data collection, data analysis, and ethical considerations and then explains how the comparative law method is used in this study.

Chapter 6 presents the findings in this study.

Chapter 7 discusses the comparative analysis of equity crowdfunding in the US, Australia, and Indonesia. It analyses similarities and differences in regulations and selected issues in the regulation of equity crowdfunding.

Chapter 8 discusses these findings in the context of the existing literature on equity crowdfunding and the comparative law analysis from the previous chapter.

Chapter 9 conclude with recommendations for policy practice of equity crowdfunding, followed by suggestions for future research.

Chapter 2 : Literature Review on Equity Crowdfunding and Legal Transplant

2.1 Definition of Crowdfunding

The term crowdfunding originally came from the word 'crowdsourcing', which was first introduced by Jeff Howe in Wired magazine.[25] Howe defined crowdsourcing as:[26]

> [. . .] the act of taking a job traditionally performed by a designated agent (usually an employee) and outsourcing it to an undefined, generally large group of people in the form of an open call.

Howe's definition of crowdsourcing is easy to understand as it correlates with the term 'outsourcing' in its definition. However, at the same time, this definition could lead a layperson to associate crowdsourcing with another type of activity such as YouTube and Wikipedia which, according to Brabham, is basically not crowdsourcing. The reason is because these two examples do not have the element of 'an open call'[27] and reward, as commonly received after taking a job.[28] Brabham provides a more precise definition of crowdsourcing as:[29]

> … an online, distributed problem-solving and production model that leverages the collective intelligence of online communities to serve specific organizational goals. Online communities, also called *crowds*, are given the opportunity to respond to crowdsourcing activities promoted by the organization, and they are motivated to respond for a variety of reasons.

Brunetti explains that the critical elements of crowdsourcing are the use of people's participation as the funding sources, and the main 'object of exchange' is money.[30] In this sense, crowdsourcing activity is defined as: 'a form of production that involves people, who are outside the organisation and not included among its commercial suppliers, in various activities at various levels'.[31] Experts use other terms that have a

[25] Alan Tomczak and Alexander Brem, 'A Conceptualized Investment Model of Crowdfunding' (2013) 15(4) *Venture Capital* 335, 338.

[26] Ibid.

[27] See Collins-Dictionary, 'Definition of 'open call'', <https://www.collinsdictionary.com/dictionary/english/open-call>.

[28] Daren C. Brabham, *Crowdsourcing* (The MIT Press, 2013) xviii.

[29] Ibid xix.

[30] Federico Brunetti, 'Web 2.0 as Platform for the Development of Crowdfunding' in Roberto Bottiglia and Flavio Pichler (eds), *Crowdfunding for SMEs: A European Perspective* (Palgrave Macmillan, 2016) 45, 53.

[31] Ibid 52.

similar meaning to crowdsourcing, such as 'peer production, collaborative economy, wikinomics, sharing economy, and sharing capitalism'.[32]

There is no universal definition of crowdfunding; experts and authorities use different definitions for it.[33] Other terms that have the same meaning as crowdfunding are crowd-investing[34], crowd-financing,[35] and crowd-sourced funding[36]. One of the most popular definitions of crowdfunding is from Belleflamme, Lambert, and Schwienbacher who assert that:[37]

> Crowdfunding involves an open call, mostly through the Internet, for the provision of financial resources either in the form of donation or in exchange for the future product or some form of reward to support initiatives for specific purposes.

Bradford offers another definition of crowdfunding as 'raising small amounts of money from the crowd from a large number of investors'.[38] He explains that the transaction cost of capital formation has been extensively reduced by the facilitation of the internet and has influenced the general public to allocate their money to entrepreneurs who are facilitated by crowdfunding platforms such as Kickstarter and IndieGoGo.[39] Mollick suggests that a complete definition of crowdfunding is arbitrarily limiting since the business practice and the academic concept is in the evolutionary stage.[40] Therefore, any definition should not limit the future development of the concept of crowdfunding. Brunetti summarises the elements of crowdfunding as:[41] (1) a promoter; (2) the purpose of gathering funds; (3) addressed to a wide public; (4) the final aim of starting profit and non-profit projects; (5) internet and Web 2.0 as providing infrastructural conditions; and (6) a platform as an intermediary for the activity.

This thesis uses Belleflamme et al.'s definition as explained above. While this definition does not refer to all elements of crowdfunding, it is open to future development of the concept.

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[32] Ibid.

[33] Tomczak and Brem (n 25) 338.

[34] Ibid.

[35] Ibid.

[36] Australian Securities and Investment Commission, *Crowd-Sourced Funding: Guide for Public Companies* (Regulatory Guide 261, June 2020).

[37] Paul Belleflamme, Thomas Lambert and Armin Schwienbacher, 'Crowdfunding: Tapping the Right Crowd' (2014) 29(5) *Journal of Business Venturing* 585, 588.

[38] C. Steven Bradford, 'Crowdfunding and the Federal Securities Laws' (2012) 2012(1) *Columbia Business Law Review* 1, 5.

[39] Ibid.

[40] Ethan Mollick, 'The Dynamics of Crowdfunding: an Exploratory Study' (2014) 29(1) *Journal of Business Venturing* 1, 2.

[41] Brunetti (n 30) 54.

2.2 Types of Crowdfunding

Crowdfunding can be: donation-based, reward-based[42], debt-based[43], and equity-based[44]. While there are other crowdfunding variants such as revenue-sharing and hybrid models[45], this thesis differentiates these four types of crowdfunding.

2.2.1 Donation crowdfunding

In donation crowdfunding, funders will receive no financial benefit of any kind in return for their contribution.[46] It is commonly used by non-governmental organisations (NGOs) to raise funding for a specific project which can be a long-term project over more than ten years.[47] Charitable organisations also use this type of crowdfunding for shorter term projects such as 'disaster relief campaigns'.[48]

2.2.2 Reward crowdfunding

Funders of reward crowdfunding will receive a 'non-monetary reward' in exchange for their contribution to the fund seekers.[49] The reward is of 'a symbolic value' and should not be classified as 'a legally binding obligation to provide goods' as it is not a sale.[50] This type of crowdfunding has been used mostly for creative projects, such as art exhibitions, CD or DVD music albums.[51]

2.2.3 Debt (lending) crowdfunding or P2P lending

In debt (lending) crowdfunding, the funders act as lenders who will receive interest, and the fund seeker is the borrower who will pay the interest.[52] P2P lending and peer to business (P2B) lending are categorised within this type of crowdfunding, since they commonly use a 'financing model for loans', where both parties, the lenders and the

[42] Belleflamme, Lambert and Schwienbacher (n 37), 588.

[43] David Groshoff, Alex Nguyen and Kurtis Urien, 'Crowdfunding 6.0: Does the SEC's FinTech Law Failure Reveal the Agency's true Mission to Protect - Solely Accredited - Investors' (2014) 9 *Ohio State Entrepreneurial Business Law Journal* 277, 282.

[44] Bradford prefers to differentiate crowdfunding in donation model, reward model, pre-purchase model, lending model, and equity model. See Bradford (n 38) 15.

[45] Kristof De Buysere et al, *A Framework for European Crowdfunding* (2012) 11 <http://eurocrowd.org/2012/10/29/european_crowdfunding_framework/>.

[46] Groshoff, Nguyen and Urien (n 43) 281-282.

[47] Buysere et al (n 45) 10.

[48] Flavio Pichler and Ilaria Tezza, 'Crowdfunding as a New Phenomenon: Origins, Features and Literature Review' in Roberto Bottiglia and Flavio Pichler (eds), *Crowdfunding for SMEs: A European Perspective* (Palgrave Macmillan, 2016) 5, 10.

[49] Groshoff, Nguyen and Urien (n 43) 282.

[50] Buysere et al (n 45) 10.

[51] Pichler and Tezza (n 48) 10-11.

[52] Groshoff, Nguyen and Urien (n 43) 283.

borrowers, 'do not know each other'.[53] In P2P lending, the money is directly borrowed from the peers through an online platform, not an intermediary such as banks or other types of financial institutions.[54] In P2B lending, while the lenders are individuals, the borrowers are companies or business ventures.[55]

Social lending crowdfunding can be classified as lending crowdfunding, although it can be considered 'a form of donation crowdfunding'[56]. In this type of crowdfunding, the fund seekers do not offer interest and is commonly used to fund micro-finance in developing countries.[57] Other writers use the term 'microfinance' as a form of crowdfunding when it uses the internet to collect funds from the crowd.[58] Proponents of this model include Kiva.org.[59] This platform uses the fund to provide lending in least developed countries.[60] It does not charge interest if the fund seekers lend directly from Kiva.org, but the lenders expect that the principal of the loan is to be repaid.[61] However, if the lending comes from Kiva's partners, who act as an intermediary, an agreed amount of interest will be charged to the fund seekers, as an operational and supervision fee for the intermediary.[62] The use of field partners[63] as intermediaries to screen borrowers, disburse loans, and collect payments for Kiva, helps it to connect with extensive borrowers from many developing and least developed countries.[64]

[53] Buysere et al (n 45) 11.
[54] Pichler and Tezza (n 48) 11.
[55] Ibid 15.
[56] Ibid 10.
[57] Buysere et al (n 45) 10.
[58] Tanya Y. Beaulieu, Suprateek Sarker and Saonee Sarker, 'A Conceptual Framework for Understanding Crowdfunding' (2015) 37 *Communications of the Association for Information Systems* 1, 15.
[59] Kiva.org is the first social microfinance platform in the US, a type of lending crowdfunding that provides loans for the selected project in developing countries. See Everett (n 14) 24.
[60] Beaulieu, Sarker and Sarker (n 58) 15. For the definition of least developed countries, see supra note 8 on the World Economic Situation and Prospects.
[61] Ibid.
[62] Ibid.
[63] Field partners are microfinance institutions, schools, NGO's or social enterprises in developing countries that connect Kiva.org with the borrowers. The role of a field partner is disbursing loans to the borrowers and collecting payments. See Channing Fisher, 'Kiva 101: What's a Field Partner?', *Kiva Lend* (Blog Post) <https://www.kiva.org/blog/kiva-101-whats-a-field-partner#:~:text=When%20you%20lend%20to%20most,schools%2C%20social%20enterprises%20and%20NGO's.>.
[64] Kiva.org, 'Where Kiva works' (Blog Post) <https://www.kiva.org/about/where-kiva-works>.

2.2.4 Equity crowdfunding

In equity crowdfunding, funders obtain shares[65], bonds, or other types of securities[66] in return for their investment in the fund seeker's company. Investors receive dividends or capital gain as the financial return on their investment if they buy shares, or receive interest and the principal of the loan if they buy bonds or mini-bonds.[67] Start-ups and existing companies can use equity crowdfunding to raise money for their capital needs.[68] A similar mechanism is used for 'profit and revenue sharing', where backers receive an agreed percentage of earnings from a project which they have supported.[69] Several experts categorize this arrangement as a form of P2P lending, while others consider it equity crowdfunding[70]

2.2.5 Other classification of crowdfunding

Researchers have categorised crowdfunding into two types depending on the expected return for backers.[71] The first category, donation crowdfunding (also known as crowd-sponsoring and community crowdfunding) occurs when the backers simply donate their money to the fund seekers and do not expect anything, either as a financial return, or as non-monetary reward.[72] The second category is crowd-investing (which includes P2P lending, equity crowdfunding, and profit and revenue-sharing) where the backers expect a financial return from their investment.[73]

Therefore, the selection of the relevant crowdfunding model depends on the motivation of fund-seeker and the expected outcome. As an illustration, Belleflamme et al. compare two types of crowdfunding: the pre-ordering and profit-sharing models where entrepreneurs prefer to employ pre-ordering if they want to secure a small amount of funding, and profit-sharing if they are seeking a relatively high amount of capital.[74] However, other scholars maintain that the hybrid model, which combines two or more types such as investment crowdfunding combined with donation crowdfunding, is an

[65] Garry A. Gabison, *Understanding Crowdfunding and its Regulations* (Science and Policy Report, European Commission Joint Research Centre, 2015) 10.
[66] Andrew A. Schwartz, 'Crowdfunding Securities' (2012) 88 *Notre Dame Law Review* 1457, 1458.
[67] Pichler and Tezza (n 48) 11.
[68] Ibid.
[69] Ibid.
[70] Ibid.
[71] Ibid 12.
[72] Ibid.
[73] Ibid.
[74] Belleflamme, Lambert and Schwienbacher (n 37) 586.

alternative approach.[75] Since the focus of this study is equity crowdfunding, other types of crowdfunding will not be discussed further except where relevant to particular topics.

2.3 Definition of Equity Crowdfunding

This thesis adopts the definition of equity crowdfunding of Ahlers, Cumming, Günther, and Schweizer as:[76]

> … a method of financing, whereby an entrepreneur sells a specified amount of equity or bond-like shares in a company to a group of (small) investors through an open call for funding on internet-based platforms.

Belleflamme et al. in their definition add the element of offering 'financial compensation'[77] such as 'equity, revenue, and profit-share arrangements', adding that '[e]quity-based crowdfunding is defined as a model in which crowd funders receive financial compensation (e.g., equity, revenue, and profit-share arrangements)'.

Tuomi and Harrison explain that since the business model of crowdfunding is still evolving, some crowdfunding platforms offer 'a profit-sharing type of crowdfunding', similar to venture capital, where the platform runs a pool of investment fees in 'a community investment fund' which are collected from investors and invested in certain ventures.[78] After holding the fund for several years, typically 20%-25% of the profit is taken by the platforms and the remainder is distributed to the investors.[79]

Another type of crowdfunding often categorized as equity crowdfunding is a profit-sharing model where investors receive an agreed amount of 'share of profit' as the financial return on their investment.[80] An example of this model is the Hong Kong-based platform, Grow VC, which pools investors' money and invests the funds in selected projects for an agreed term, usually three years.[81] At the end of the investment period, Grow VC will take 25% of the profit-sharing received, and 75% will be returned and shared among the investors.[82] Burkett argues that the profit-sharing model of Grow VC

[75] Alice Rossi and Silvio Vismara, 'What Do Crowdfunding Platforms Do? A Comparison Between Investment-Based Platforms in Europe' (2018) 8(1) *Eurasian Business Review* 93, 102.

[76] Gerrit K. C. Ahlers et al, 'Signaling in Equity Crowdfunding' (2015) 39(4) *Entrepreneurship: Theory & Practice* 955, 958.

[77] Paul Belleflamme, Thomas Lambert and Armin Schwienbacher, 'Individual Crowdfunding Practices' (2013) 15(4) *Venture Capital* 313, 317.

[78] Krista Tuomi and Richard T. Harrison, 'A Comparison of Equity Crowdfunding in Four Countries: Implications for Business Angels' (2017) 26(6) *Strategic Change* 609, 609.

[79] Ibid.

[80] Pichler and Tezza (n 48) 16-17.

[81] Ibid.

[82] Ibid.

is similar to 'the pure investment crowdfunding operation' offered by ProFounder, a US-based platform which acts as 'a matchmaker' between fund seekers and funders who already have a pre-existing relationship with the fund seeker.[83] The platform creates the conditions for 'private placement offerings', which do not require registration statements under *the Securities Act of 1933*.[84]

However, according to Heminway and Hoffman, a profit-sharing model in crowdfunding is likely to be categorised as an investment contract under relevant US law, although there might be a combination of financial and non-financial return or 'hybrid return'.[85] Therefore, they argue that this model needs to be registered under *the Securities Act of 1933*.[86] Tomczak and Brem also suggest that the profit-sharing model is a form of equity crowdfunding [87], as long as there is an element of monetary compensation or the intention of funders is a financial return from ventures which seek funds from investors.

Nevertheless, Belleflamme et. al. categorise the profit-sharing model as a different type of crowdfunding.[88] One example is Seedmatch, a German crowdfunding platform, which facilitates equity investors to buy shares in start-up companies through a financial vehicle.[89] Start-ups can raise up to €100,000 (A$164,000), mostly backed by 80 to 160 investors.[90]

2.4 The Rising Popularity of Crowdfunding

Crowdfunding is becoming popular for entrepreneurs of start-up and new ventures to provide capital for early-stage businesses[91] and has achieved astonishing success.[92] Equity crowdfunding has been increasing as a significant part of entrepreneurial finance in the UK, and is likely to develop further in the US in the coming years.[93]

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[83] Edan Burkett, 'A Crowdfunding Exemption - Online Investment Crowdfunding and U.S. Secrutiies Regulation' (2011) 13 *Transactions: The Tennessee Journal of Business Law* 63, 77.

[84] Ibid.

[85] Joan MacLeod Heminway and Shelden Ryan Hoffman, 'Proceed at Your Peril: Crowdfunding and the Securities Act of 1933' (2010) 78 *Tennessee Law Review* 879, 897.

[86] Ibid 906.

[87] Tomczak and Brem (n 25) 352.

[88] Belleflamme, Lambert and Schwienbacher (n 37) 585.

[89] Ibid 589.

[90] Ibid.

[91] Tomczak and Brem (n 25) 335.

[92] Mollick (n 40) 4.

[93] Nir Vulkan, Thomas Åstebro and Manuel Fernandez Sierra, 'Equity crowdfunding: A New Phenomena' (2016) 5 *Journal of Business Venturing Insights* 37, 45.

2.4.1 The reason why crowdfunding occurs

The internet and social media have provided new opportunities for funding of business ventures by public investors. Agrawal, Catalini, and Goldfarb argue that geographic factors limit funding sources for the initial stage of creative projects. They note that typically direct interaction between investors and the project is required in order to conduct due diligence to mitigate information asymmetry and related risk.[94] However, the internet has intensified communication and connections between individuals, broadening the range of interactions that previously were limited by geographic location.[95] Likewise, it has been used by potential investors to connect with business people to fund their ventures.[96] Although web-based crowdfunding is new, the generic concept of crowdfunding has long been used; for example, by politicians to raise money from the public for their political campaigns.[97]

In crowdfunding, funding platforms typically invite each member of a large audience (the crowd) to invest a small amount of money, rather than accumulate a substantial amount of capital from several sophisticated investors.[98] The structure means that any person is theoretically eligible to invest and makes this the most inclusive method of capital raising, compared with conventional funding sources.[99] Some authors refer to 'democratized access to investment opportunities', to describe the broad participatory inclusiveness of crowdfunding.[100]

Originally, however, internet-based crowdfunding used social media platforms such as YouTube, Facebook, and Twitter to provide opportunities for would-be members or 'fans' to contribute to a particular project.[101] Tomczak and Brem differentiate between direct and indirect crowdfunding campaigns.[102] In a direct campaign, the fund seekers make 'a pitch directly' using their website or their fan club's

[94] Ajay Agrawal, Christian Catalini and Avi Goldfarb, 'Some Simple Economics of Crowdfunding' (Pt University of Chicago Press) (2014)(1) *Innovation Policy and the Economy* 63, 63.

[95] Blair Bowman, 'A Comparative Analysis of Crowdfunding Regulation in the United States and Italy' (2015) 33 *Wisconsin International Law Journal* 318, 319.

[96] Ibid.

[97] Bradford (n 38) 11.

[98] Belleflamme, Lambert and Schwienbacher (n 37) 586.

[99] Andrew Schwartz, 'Inclusive Crowdfunding' (2016) 2016 *Utah Law Review* 661, 662.

[100] Alma Pekmezovic and Gordon Walker, 'The Global Significance of Crowdfunding: Solving the SME Funding Problem and Democratizing Access to Capital' (2016) 7 *William and Mary Business Law Review* 347, 351. See also Joan MacLeod Heminway, 'Business Lawyering in the Crowdfunding Era' (2014) 3(1) *American University Business Law Review* 149, 151.

[101] Daniel M. Satorius and Stu Polland, 'Crowd Funding - What Independent Producers Should Know about the Legal Pitfalls' (2010) 28 *Entertainment and Sports Lawyer* 15, 15.

[102] Tomczak and Brem (n 25) 342.

website, instead of using a crowdfunding platform as an intermediary. In an indirect campaign, a crowdfunding platform is typically used to mediate between fund seekers and potential funders. This differentiation is critical to identifying the level of restriction by regulation: firstly, whether or not regulation allows an entrepreneur to do crowdfunding only if using a crowdfunding platform; secondly, whether or not an entrepreneur can use a direct campaign; and thirdly, whether both types of the campaign can be used.

Other scholars argue that the emergence of crowdfunding resulted from economic and technological developments. Factors include: the tightening of bank lending after the global financial crisis of 2007-2008, followed by an economic downturn worldwide, and the availability of systems provided by 'Web 2.0'.[103] Since the financial crises in 2007-2008, capital constraint and the importance of stimulating and funding newly created SMEs have been the subject of discussion for policymakers, the financial industry, and relevant professionals.[104]

The limited availability of traditional capital has hampered the development of SMEs and impacted on their role in providing jobs and employment. Based on the European Commission's Annual Report Database of 27 EU Member States, Gerrit de Wit and Jan de Kok analyzed data from 2002 to 2012 and found that small firms provide more jobs compared to large firms in almost all industries.[105] Other studies have produced

[103] Pichler and Tezza (n 48) 5.

[104] Vincenzo Capizzi and Emanuele Maria Carluccio, 'Competitive Frontiers in Equity Crowdfunding: The Role of Venture Capitalists and Business Angels in the Early-Stage Financing Industry' in Roberto Bottiglia and Flavio Pichler (eds), *Crowdfunding for SMEs: A European Perspective* (Palgrave Macmillan, 2016) 117, 117.

[105] Gerrit de Wit and Jan de Kok, 'Do Small Businesses Create More Jobs? New Evidence for Europe' (2014)(2) *Small Business Economics* 283, 294.

similar results.[106] As 99 percent of businesses in the EU are SMEs, this sector provides a large number of jobs.[107]

2.4.2 Significant growth of crowdfunding

In 2014 equity crowdfunding worldwide campaigns, as an alternative source of seed capital[108] raised US$1.1 billion (A$1.54 billion), compared to almost $11 billion (A$15.4 billion) from P2P lending, although this number is still considered small if compared with angel investment[109] in the US and the UK which raised $24 billion (A$33.6 billion) and $1 billion (A$1.4 billion) respectively.[110] The most rapid growth of equity crowdfunding has been in the UK,[111] where it increased from £1.7m (A$3.11 million) in 2011 to £245m (A$448.67 million) in 2015. As such, it was almost equal to the total investment from venture capital.[112] This equity crowdfunding supported for more than 35% of 'seed-stage investment deals' and 21% of 'early-stage investment', and started to challenge venture capital and angel investment as sources of seed capital.[113] The first equity crowdfunding UK platform authorised by the FCA was Seedrs established in 2011, and the largest equity crowdfunding platform worldwide is the UK platform, Crowdcube,[114] which has successfully facilitated more than £391 million (A$716 million) raised from almost 500,000 registered investors, with an average investment of £1,430 (A$2,619) as of February 2018.[115]

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[106] See, eg, Wagner Joachim, 'Firm Size and Job Quality: A Survey of the Evidence from Germany' (1997) 9(5) *Small Business Economics* 411; Fotini Voulgaris, Theodore Papadogonas and George Agiomirgianakis, 'Job Creation and Job Destruction in Greek Manufacturing' (2005) 9(2) *Review of Development Economics* 289; J. Butani Shail et al, 'Business Employment Dynamics: Tabulations by Employer Size' (Pt Bureau of Labor Statistics of the U.S. Department of Labor) (2006) 129(2) *Monthly Labor Review* 2; Neumark David, Wall Brandon and Zhang Junfu, 'Do Small Business Crete More Jobs? New Evidence for the United States from the National Establishment Time Series' (Pt MIT Press) (2011) 93(1) *The Review of Economics and Statistics* 16. Picot Garnett and Dupuy Richard, 'Job Creation by Company Size Class: The Magnitude, Concentration and Persistence of Job Gains and Losses in Canada' (1998) 10(2) *Small Business Economics* 117; John Haltiwanger, Ron S. Jarmin and Javier Miranda, 'Who Creates Jobs? Small versus Large versus Young' (2013) 95(2) *The Review of Economics and Statistics* 347.

[107] Sebastiaan N. Hooghiemstra and Kristof de Buysere, 'The Perfect Regulation of Crowdfunding: What Should the European Regulator Do?' in Dennis Bruntje and Oliver Gajda (eds), *Crowdfunding in Europe: State of the Art in Theory and Practice* (Springer, 2016) 135, 135.

[108] Tomczak and Brem (n 25) 382.

[109] The term angel investors 'generally refers to high-net worth individuals who typically invest in small, private firms on their own account'. See Andrew Wong, Mihir Bhatia and Zachary Freeman, 'Angel Finance: the Other Venture Capital' (2009) 18(7/8) *Strategic Change* 221, 222.

[110] Tuomi and Harrison (n 78) 610.

[111] Vulkan, Åstebro and Sierra (n 93) 38.

[112] Tuomi and Harrison (n 78) 610.

[113] Vulkan, Åstebro and Sierra (n 93) 38.

[114] Silvio Vismara, 'Equity Retention and Social Network Theory in Equity Crowdfunding' (2016) 46(4) *Small Business Economics* 579, 582.

[115] Crowdcube, 'Discover and Invest in Businesses on Crowdcube' <https://www.crowdcube.com/how-to-invest>.

In recent years, the crowdfunding market worldwide has grown significantly. In 2014 crowdfunding platforms accumulated more than $16 billion (A$22.4 billion), and this doubled to $34.4 billion (A$48.15 billion) the following year, and rose steeply to $304.53 billion (A$426.28 billion) in 2018.[116] Outside North-America and Europe, crowdfunding has also developed significantly in Asia, particularly in China, which raised $72 million (A$100.7 million) in 2014 and more than $215 billion (A$300.9 billion) in 2018.[117] Thus, equity crowdfunding has been acknowledged as potentially promoting innovation, creating new employment opportunities, and increasing economic growth.[118]

2.4.3 Failed equity crowdfunding projects

Not all equity crowdfunding projects succeed. In Germany, of 86 projects analysed in May 2015, only four received an early exit option for investors as a form of investment reward, because of follow-up financing from venture capital.[119] However, many other investors suffered from poor investment; for example, 22 of the projects resorted to insolvency proceedings, only several weeks after the equity crowdfunding issuance.[120] This situation was similar in the UK between 2012 and 2013. The percentage of venture failures using equity crowdfunding was around 20-25%, higher than other sources of seed capital, at around 6%-8%, although in subsequent years the failure rate was less at around 4.5% in 2014.[121]

2.5 Characteristics of Equity Crowdfunding

2.5.1 Geographical dispersion

Findings have confirmed that the geographic location of investors in equity crowdfunding is widely distributed, overcoming the problem of traditional funding such as venture capitals, which is constrained by the distance between the fundraisers and the investors. Based on the analyses of more than 17,000 investors on 636 campaigns from 2012 to 2015 in SEEDRS, a UK equity crowdfunding platform, Vulkan, Astebro and Sierra found that investors were dispersed ‘across the country’, although most were

[116] Pichler and Tezza (n 48) 22. See also P2PMarketData, ‘Crowdfunding Statistics Worldwide: Market Development, Country Volumes, and Industry Trends’ (Blog Post, 16 May 2020) <https://p2pmarketdata.com/crowdfunding-statistics-worldwide/>.

[117] Pichler and Tezza (n 48) 22-24; p2pmarketdata.com (n 116).

[118] Corporations and Markets Advisory Committee (CAMAC), Australian Government, ‘Crowd Sourced Equity Funding’ (Report, 2014) 6.

[119] Tuomi and Harrison (n 78) 611.

[120] Ibid.

[121] Ibid.

located in London.[122] Similarly, Mollick suggests that the importance of 'online social networks and communities' increases in reward-based crowdfunding and reduces the investment constraint caused by geographical location.[123] Giudici et al. analysed 461 projects on 11 Italian crowdfunding platforms from October 2012 to March 2013. They found that the success factor of the funding goal had a positive relationship with the social capital of the fund-seekers, while the geographical position of the fund-seekers had a weak relationship with the funding target.[124] A study of a music platform in the Netherlands, Sellaband, revealed that investment decisions in revenue-sharing crowdfunding had a weak relationship with the geographic distance between the artist and the funders.[125] However, social relations, such as friends and families, still influence initial investment decisions because they can identify whether an artist is worthy of being funded, while geographically distant investors may not have such information.[126]

2.5.2 Low-cost, simple and shorter process

Equity crowdfunding has the potential to provide cheaper funding compared with conventional sources. Armour and Enriques found that cost associated with compliance with securities law for making an initial public offering is estimated at between €1 million (A$1.6 million) to €2.3 million (A$3.7 million).[127] While most start-ups are unable to access capital from the regulated market, entrepreneurs can use crowdfunding as an alternative for their unmet demand for capital.[128] In Australia, the 2014 Corporations and Markets Advisory Committee Report also recognised that equity crowdfunding provides start-up companies and small enterprises with an opportunity to collect funds from a large number of investors using the internet or other social media.[129] It considered that this new type of company fundraising could play a crucial role in financing innovative projects that traditional sources cannot provide.[130]

[122] Vulkan, Åstebro and Sierra (n 93) 38.

[123] Mollick (n 40), 14.

[124] Giancarlo Giudici, Massimiliano Guerini and Cristina Rossi Lamastra, 'Why Crowdfunding Projects Can Succeed: The Role of Proponents' Individual and Territorial Social Capital', SSRN (24 April 2013) 10 <https://ssrn.com/abstract=2255944>.

[125] Ajay Agrawal, Christian Catalini and Avi Goldfarb, 'Crowdfunding: Geography, Social Networks, and the Timing of Investment Decisions' (2015) 24(2) *Journal of Economics & Management Strategy* 253, 271.

[126] Ibid 268.

[127] John Armour and Luca Enriques, 'The Promise and Perils of Crowdfunding: Between Corporate Finance and Consumer Contracts' (2018) 81(1) *The Modern Law Review* 51, 55.

[128] Ibid.

[129] Corporations and Markets Advisory Committee (n 118) 6.

[130] Ibid.

One of the advantages of using crowdfunding is that while it can access a vast number of investors, the process is simpler and shorter from the perspective of the entrepreneur.[131] Compared with traditional sources of capital, contracts in crowdfunding are relatively simple, the process is shorter, and it can reach a much wider pool of possible investors.[132]

2.5.3 Stepping stone to securing another source of funding

Given that equity crowdfunding can facilitate early funding for start-up companies, it can also be used as a 'stepping stone' strategy for companies to acquire other sources of funding after the subsequent development of companies.[133] It can therefore be used by new ventures to access other types of funding sources.

2.5.4 Improve the efficiency of the funding market

The availability of equity crowdfunding as an alternative to filling capital gaps for entrepreneurs could improve competitiveness among capital providers. A lower cost of funding could increase the business competitiveness of small enterprises.[134] Equity crowdfunding enables projects to be funded by an alternative source of funding outside a securities exchange, as well as facilitating opportunities for investors using online internet platforms that enable them to interact directly with the entrepreneurs.[135] By fulfilling the demand for new ventures to obtain capital, crowdfunding could allow financial markets to improve their efficiency.[136]

2.5.5 High-risk investment of equity crowdfunding

Investing in start-up companies carries risks of 'uncertainty, information asymmetry, and opportunism in the form of agency costs'.[137] Equity crowdfunding also carries unwanted risks[138] such as default/investment failure, platform closure/failure, fraud, lack of investment liquidity (making exit difficult for investors), cyber-attack, and lack of transparency.[139] Investing in equity crowdfunding is considered illiquid because

[131] Vulkan, Åstebro and Sierra (n 93) 38.
[132] Ibid 47.
[133] Belleflamme, Omrani and Peitz (n 1) 13.
[134] Corporations and Markets Advisory Committee (n 118) 6.
[135] Ajay K. Agrawal, Christian Catalini and Avi Goldfarb, 'The Geography of Crowdfunding' (Working Paper No. 16820, National Bureau of Economic Research, 2011), 4.
[136] Vismara (n 114) 579.
[137] Ronald J. Gilson, 'Engineering a Venture Capital Market: Lessons from the American Experience' (2002) 55 *Stanford Law Review* 1067, 1076-7.
[138] Gabison (n 65) 20.
[139] Eleanor Kirby and Shane Worner, 'Crowdfunding: An Infant Industry Growing Fast' (IOSCO Staff Working Paper, SWP3/2014) 23-27 <https://www.iosco.org/research/pdf/swp/Crowd-funding-An-Infant-Industry-Growing-Fast.pdf>.

the secondary market for this type of investment is unlikely exist due to practical reasons. The number of issued securities in an equity crowdfunding offering is likely too small[140] to be transacted in a secondary market.[141] Therefore, the exit strategy for investing in equity crowdfunding is acquisition.[142]

The issue of company failures is contested. A survey of 955 equity crowdfunding campaigns from 751 companies in the UK revealed the number of companies that realised a return for investors increased significantly from 24% in 2011 to 97% in 2016.[143] Although the aggregate of failed companies reached 30% in 2013, it subsequently decreased to almost 5% in 2014 and 3% in 2015.[144] This finding suggests that the benefit of investment in this instrument can outweighs the number of failures.

2.5.6 Equity crowdfunding serves as a capital alternative for start-ups

2.5.6.1 Crowdfunding fills the funding gap left open by venture capitals and angel Investors in developed and developing countries

In both advanced and developing countries a funding gap exists for start-up companies and SMEs[145] because the sources which are supposed to provide capital, such as venture capital and private equity, generally consider that providing funding for this segment is not in their financial interest.[146] Studies in the US and Europe found that €1,000,000 (A$1.6 million) was the minimum investment sought by venture capitals.[147] While the funding required by start-ups and SMEs was around €50,000 (A$82,440) and €300,000 (A$494,700), this amount was not economically viable for venture capital or private equity, compared to the time invested in evaluating the businesses and the expected cash flow generated which is difficult to predict and is sustainable only in the long term.[148] Studies have shown that the funds provided by venture capital is mostly concentrated in companies located in 'financial centres and high-tech regions', leaving

[140] Schwartz (n 66) 1463.

[141] Richard A. Epstein, 'The Political Economy of Crowdsourcing: Markets for Labor, Rewards, and Securities' (2015) 82 *University of Chicago Law Review Dialogue* 35, 50.

[142] Michael E. Cummings et al, 'An equity crowdfunding research agenda: evidence from stakeholder participation in the rulemaking process' (2020) 54(4) *Small Business Economics: An Entrepreneurship Journal* 907, 909.

[143] AltFi Data, 'Where are They Now 2016, A Report Into the Status of Companies that Have Raised Finance Using Equity Crowdfunding in the UK' (Report, Nabarro and AltFiData, November 2016) 22 <https://www.altfi.com/downloads/Where_are_they_now_2016.pdf>.

[144] Ibid 25.

[145] Capizzi and Carluccio (n 104) 117.

[146] Ibid.

[147] Ibid 117-118.

[148] Ibid 118.

those in remote regions without access to this source of long term capital.[149] Moreover, many venture capitals have changed their attention from seed stage to the later stage of start-ups.[150]

In Europe, the other traditional sources of funding for early-stage capital financing such as banks and angel investors are also not accessible for most SMEs and start-ups [151] because they lack a financial and operating history and collateral. Therefore, banks are constrained in providing them with funding.[152] Additionally, access to the securities market is not a viable alternative due to the high fixed costs needed to obtain this capital[153] and has been identified as the most salient reason for the development of SMEs and new business ventures.[154]

Angel investors, also referred to as informal venture capitals or business angels, commonly invest in the early stage of a business using their own savings to make a short-term investment and then exiting early to obtain financial gain.[155] They either work individually or in a network, provide capital as syndication, diversify risks and reduce screening costs. They are considered sophisticated investors who can provide capital of around €1,000,000 (A$1.6 million)[156] and a viable option for 'early-stage financing'. They usually do not have a family relationship with the entrepreneur and are not only investing their money but also their expertise and time.[157]

Angel investors' role is very important not only to provide capital but also because of non-monetary support to start-ups. First, angel investors' approach during the investment process is considered more friendly to the entrepreneurs. Angel investors usually invest their own money and have more tolerance with the investment period and typically employ weaker control in the investment contract compared with venture

[149] Sofia Avdeitchikova, 'False Expectations: Reconsidering the Role of Informal Venture Capital in Closing the Regional Equity Gap' (2009) 21(2) *Entrepreneurship & Regional Development* 99, 100.

[150] Thomas Hellmann and Veikko Thiele, 'Friends or Foes? The Interrelationship Between Angel and Venture Capital Markets' (2015) 115(3) *Journal of Financial Economics* 639, 639. See also Peter Mitchell, 'Venture Capital Shifts Strategies, Startups Suffer' (2009) 27(2) *Nature biotechnology* 103, 104; KPMG, 'VC Investment in Australian Startups Hits New Peak' (Media Releases, 15 July 2018) <https://home.kpmg/au/en/home/media/press-releases/2018/07/vc-investment-in-australian-startups-hits-new-peaks-16-july-2018.html>.

[151] Hooghiemstra and Buysere (n 107) 136.

[152] Ibid.

[153] Colin M. Mason and Richard T. Harrison, 'Closing the Regional Equity Capital Gap: The Role of Informal Venture Capital' (1995) 7(2) *Small Business Economics* 153, 153.

[154] Ibid.

[155] Capizzi and Carluccio (n 104) 126-7.

[156] Ibid 118.

[157] Hooghiemstra and Buysere (n 107) 136.

capitals.[158] Second, many angel investors are retired entrepreneurs or skilful professionals who offer their expertise and experience to improve the companies' governance and help formulate the start-ups' strategy.[159] Lastly, the business sectors that angel investors choose to invest are broader than venture capitals, which commonly invest in innovative start-ups and prefer to be more specialized in particular industries.[160]

2.5.6.2 Limited role of angel investors in start-ups funding

Of 20,619 entrepreneurs seeking funding in the US in 2010, less than 500 (around three percent) received funding from angel investors, and average funding decreased significantly from around US$1 million (A$1.4 million) in 2004 to only around US$500,000 (A$700,000) in 2009.[161] In the UK, in 2009/2010, most angel investors tend to provide capital of more than £100,000 (A$183,000) for start-ups.[162]

Angel investors' networks and the ability of venture capitals to do due diligence and mentoring can be used to support the shortcomings in crowdfunding.[163] For example, Microventures, a US crowdfunding platform, which describes its operation as combining the advantages of venture capital and crowdfunding, shares the characteristics of open access and ease of use.[164] Another example is AngeList, a platform which not only connects start-ups and angel investors, but also job opportunities and job seekers in start-ups [165], and supports other equity crowdfunding platforms such as the Republic.[166] Another is Crowdfunder which facilitates online investment directly from investors in high-growth firms backed by leading venture capital firms.[167]

Scheela and Isidro's study found similarities between angel investors in the Philippines and the US. Angel investors in both countries usually invest in early-stage

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[158] Supradeep Dutta and Timothy B. Folta, 'A Comparison of the Effect of Angels and Venture Capitalists on Innovation and Value Creation' (2016) 31(1) *Journal of Business Venturing* 39, 43.

[159] Ibid.

[160] Ibid.

[161] Nikki D. Pope, 'Crowdfunding Microstartups: It's Time for the Securities and Exchange Commission to Approve a Small Offering Exemption' (2010) 13 *University of Pennsylvania Journal of Business Law* 973, 995.

[162] Liam Collins and Yannis Pierrakis, 'The Venture Crowd: Crowdfunding Equity Investment into Business, *NESTA* (paper, July 2012) 17 <http://www.nesta.org.uk/sites/default/files/the_venture_crowd.pdf>.

[163] Tomczak and Brem (n 25) 338.

[164] MicroVentures, 'MicroVentures, One of the First Venture Capital Investment Banks', MicroVentures: Invest in Startups <https://microventures.com/>.

[165] Angellist, 'AboutAngellist' <https://angel.co/about>.

[166] Republic, 'About Republic' <https://republic.co/about>.

[167] Crowdfunder, 'Venture Capital: Crowdsourced' (blog) <https://blog.crowdfunder.com/about-crowdfunder/>.

companies, co-invest in groups, and actively provide non-financial support to start-up companies.[168] Investment climate in the Philippines is poor due to corruption, and political, economic, and legal risks, both investors and entrepreneurs lack ethical and professional conduct.[169] Angel investors tend to work in groups, relying on their informal networks to assess information about companies, because existing institutions do not typically facilitate transparency[170] and there is lack of protection for minority shareholders.[171] As a result, the number of angel investors to provide funding for start-ups was limited and they experienced difficulty in completing investment deals.[172]

The limited role of angel investors in providing financing for entrepreneurs is also common in other developing countries. In Latin America, the activities of angel investors are not well developed. The first angel network was established in 2002 in Brazil, followed by other Latin American countries from 2005 to 2010.[173] Although Argentina has strong human resources, managerial capabilities, entrepreneurial culture, and technology systems, angel investors have not significantly developed[174] due to unsupportive public policy and unstable legal, fiscal, political, and economic conditions.[175] In Brazil, the main challenges are the lack of tax incentives for angel investors and good businesses.[176]

2.5.6.3 Equity crowdfunding expands not only for start-ups but also for other firms with different lifecycles

The emergence of equity crowdfunding was initially designed to only provide capital for start-ups. However, this restriction was unpopular. In Italy, which initially prevented non-start-up companies from accessing equity crowdfunding, since 2015 has allowed it to be used not only by start-up companies but also non-start-up firms seeking

[168] William Scheela and Edmundo Isidro, S., 'Business Angel Investing in an Emerging Asian Economy' (2009) 12(4) *The Journal of Private Equity* 44, 53.
[169] Ibid 49.
[170] Ibid.
[171] Ibid 53.
[172] Ibid 49.
[173] Gianni Romani and Miguel Atienza, 'Business Angels in Developing Economies: the Experience of Latin America' in Hans Landström and Mason Colin (eds), *Handbook of Research on Business Angels* (Edward Elgar, 2016) 282, 285.
[174] Ibid 290.
[175] Ibid.
[176] Ibid 295.

alternative funding.[177] Data from 127 equity crowdfunding campaigns of two European platforms in 2015 found that 75 were successfully funded, while 52 were unsuccessful because they could not meet the target goal before the end of the funding period.[178] Technology (15 campaigns) is the most popular sector for investors and receives some 15% of total funding.[179] However, traditional business fields including manufacturing and consumer products (14 campaigns), and the food and restaurant sector (10 campaigns) also receive significant funding.[180]

2.6 Complementary Support Other Than Equity Crowdfunding

The inadequacy of the capital market in filling the need for capital sources has created an equity gap. Therefore, it is essential to promote the use of alternative facilities such as technology parks, venture incubators, business accelerators, academic spin-offs, and equity crowdfunding platforms.[181] Incubators gather early-stage firms and provide consultants and researchers to help entrepreneurs solve technical problems and create links between entrepreneurs, and potential suppliers and investors.[182] Incubators provide support for entrepreneurs to increase the survival probability and development in the early stage of a company.[183] Accelerators provide mentorship and assistance during the seed stage to help entrepreneurs interpret business models, create product prototypes, and assist the commercial tests.[184] Some accelerator programs offer access to distribution, capital funding, shared office space, and meeting with successful entrepreneurs.[185] Science parks offer start-ups with premises, technological and commercial support.[186] Incubators or accelerators usually provide capital for creating a prototype in the form of a grant or equity stake investment.[187] Thus, the funding received depends on various

[177] Veronica De Crescenzo, 'The Role of Equity Crowdfunding in Financing SMEs: Evidence from a Sample of European Platforms' in Roberto Bottiglia and Flavio Pichler (eds), *Crowdfunding for SMEs: A European Perspective* (Palgrave Macmillan, 2016) 159, 167-8.

[178] Ibid 166.

[179] Ibid 168.

[180] Ibid.

[181] Capizzi and Carluccio (n 104) 118.

[182] Ibid 121.

[183] José L. Barbero et al, 'Do Different Types of Incubators Produce Different Types of Innovations?' (2014) 39(2) *The Journal of Technology Transfer* 151, 153.

[184] Capizzi and Carluccio (n 104) 121.

[185] Thomas Kohler, 'Corporate Accelerators: Building Bridges Between Corporations and Startups' (2016) 59(3) *Business Horizons* 347, 348.

[186] Capizzi and Carluccio (n 104) 121.

[187] Ibid 131.

factors, such as the idea and the target market.[188] Typically, incubators or accelerators often require 6-10% of shared ownership in return for the funding.[189]

2.7 Not All Companies Want to Grow

It should be noted, however, that not all firms can reach the expansion stage, either because they cannot cope with the business environment or the owners lack the necessary skills or ambition to pursue the next stage of its life cycle. For example, they may be relatively satisfied with the company's achievement and choose a low-risk approach.[190]

2.8 Role of Regulation in Common Law Countries

Regulation can be discussed from a legal, political science, sociology, economics, or even public administration and management perspective.[191] According to Baldwin, Cave, and Lodge, it can be viewed in several ways.[192] Firstly, regulation is 'a specific set of commands', meaning that it is a formal rule or legislation applicable to regulated actors. Secondly, it is a 'deliberate state influence', where the state uses a variety of measures to influence public or business behaviour. Thirdly, regulation 'as all forms of social or economic influence' includes not only state measures but also private mechanisms that can be seen as regulatory. Lastly, it is known as a 'red light concept', where government acts to prevent certain activities occurring and to restrict behaviour.

2.8.1 Reason to regulate

Frieberg states that there are several justifications for governments to regulate; these are economic and social regulation.[193] In general, economic regulation covers economic instruments used by the government, such as price controls, competition policies, market access, and contract terms, while social regulation is:[194]

> [G]overnment intervention to overcome market deficiencies such as information asymmetries, to prevent harms to individuals or organizations and to the environment, to redress externalities and promote public policies.

[188] Ibid.
[189] Ibid.
[190] Ibid 120.
[191] Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press, 2nd ed, 2012) 1.
[192] Ibid 2-3
[193] Arie Freiberg and Gary Banks, *Regulation in Australia* (Federation Press, 2017) 11.
[194] Ibid.

Baldwin, Cave, and Lodge use slightly different terminology to justify regulation.[195] The first is 'market failure rationales' such as monopolies, externalities, information inadequacies, 'public goods and moral hazard', and 'scarcity and rationing'. The second is 'right-based and social rationales'. Veljanovski also explains that there are several reasons why regulations are needed.[196] The first is the 'normative economic approach' which includes efficiency and market failure rationales. The second is 'positive theories', which refers to political interference in regulation, such as the influence of private interest groups to gain favourable regulation. It should be noted that there are commonly several reasons to regulate, such as market failure, paternalism, human rights, externalities or 'social solidarity based'.[197]

Baldwin asserts that there are five tests to confirm when regulation is justified:[198]

> Is the action or regime supported by a legislative authority? (2) Is there an appropriate scheme of accountability? (3) Are procedures fair, accessible, and open? (4) Is the regulator acting with sufficient expertise? and (5) Is the action or regime efficient?

These five tests are 'benchmarks for assessing a regulatory regime' and influence debate for and against regulation and regulatory reform.[199]

According to Baldwin, there are several approaches regulation. The first is public interest theory, which is based on the beliefs that motivate regulation and established on public interest goals rather than individual or group interests.[200] Thus, the regulator sees itself as an agent for the public interest. However, Baldwin contends that the true meaning of public interest can be blurred because the regulator might have its own interests, such as securing power and acting corruptly. Moreover, it might be captured by the interests of certain groups, known as captured theory, which occurs when the regulation is influenced by the power of the regulated actors, or politicians, or even consumers, rather than aiming to serve the interests of the public.

The second is interest group theory, also known as private interest or economic theories of regulation, when the influential factor in regulating is the interest of

[195] Baldwin, Cave and Lodge (n 191) 9.
[196] Cento Veljanovski, 'Economic Approaches to Regulation' in Robert Baldwin, Cave Martin and Lodge Martin (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2012) 19-26.
[197] Baldwin, Cave and Lodge (n 191) 23.
[198] Ibid 27.
[199] Ibid 32.
[200] Ibid 40-3.

certain groups.[201] This approach is based on the belief that actors pursue and maximize their own interests. Consequently, the industry is better served by the regulation, than the interest of citizens or consumers.

The third reason for regulation is the 'power of ideas'.[202] Regulation is created not because of the public interest, but because of the force of ideas that change government policies. For example, regulatory reform [203] occurs because of the intellectual climate that influences the view that a regulatory regime has weak law enforcement and ineffective and inefficient compliance cost.[204]

The fourth approach to regulation is institutional theory that asserts regulation is shaped by 'institutional structure and arrangements' and social processes.[205] There are three strands in institutional theories. The first, 'inter-institutional relations', focuses on the design of an institution to achieve an intended outcome. For instance, it discusses to what extent the activity to regulate could be delegated to a regulatory agency or other forms of organization. If the answer is positive, how and what are the rules under which it should be delegated?[206] The second strand, intra-institutional forces, sees a change of regulation resulting from the dynamism that originates from within organizations.[207] The third strand is 'network theories and regulatory space' which views many problems in the social and economic sectors as being under the control of networks of regulators. Therefore, this strand prefers to see regulation as being multi-focussed.[208]

In Australia and many other common law countries, there are multiple tools of regulation.[209] Their selection depends on how the Government uses resources, such as authority, money, and information, as well as processes to achieve certain objectives of

[201] Ibid 43-4.

[202] Ibid 49.

[203] This study defines regulatory reform as '[t]he set of reforms to governing instruments, procedures, policies, and institutions that are, collectively, grouped'. See the International Finance Corporation, Multilateral Investment Guarantee Agency, World Bank, 'Regulatory Governance in Developing Countries' (paper, World Bank, 55645) <https://openknowledge.worldbank.org/handle/10986/27881>.

[204] Baldwin, Cave and Lodge (n 191) 49.

[205] Ibid 53.

[206] Ibid 54.

[207] Ibid 58.

[208] Ibid 63.

[209] See for example Julia Black, *Rules and Regulators* (Clarendon, 1997); Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Hart Publishing, 2004); Robert Baldwin, Martin Cave and Martin Lodge, *The Oxford Handbook of Regulation* (Oxford University Press, 1st ed, 2012); Baldwin, Cave and Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (n 191); Neil Gunningham, Darren Sinclair and Peter N. Grabosky, *Smart Regulation: Designing Environmental Policy* (Clarendon, 1998); and Peter Drahos, *Regulatory Theory: Foundations and Applications* (ANU Press, 2017).

public policies.[210] Many scholars have discussed types, instruments, and strategies of regulation. However, Freiberg's explanation concerning regulation is quite comprehensive and up to date.

Freiberg classifies five regulatory methods: economical, transactional, authorization, informational, and structural. He explains that:[211]

> Economic regulation involves the manipulation of the production, allocation or use of material resources such as money or property, in all its forms, as well as the use of markets as regulatory tools. Transactional regulation is a variant of economic regulation where the form of the economic tool assumes great importance but also involves the use of consensual or ostensibly consensual agreements between governments and non-government parties to achieve a government's objectives. The governments' exclusive power to confer benefit by authorizing or permitting certain forms of conduct is a major resource that can be deployed to direct or prohibit activities. Informational regulation relates to access to information, knowledge or beliefs as well as the deployment or manipulation of the knowledge of how people behave to nudge them into behaving in particular ways. Physical or technological power, or structural or design-based regulation, relates to the ability to manipulate the physical or technological environment to determine or influence action.

He explains that there are many instruments within economic regulation: tradeable permit scheme, auctions and tenders, price regulation, taxes, charges and levies, bounties, subsidies and rebates, and tax expenditure. Instruments within the transaction regulation group are contracts, grants, legislative agreements, agreements and accords, covenants, compliance agreements, negotiation/arbitration, and enforceable undertakings. Authorization regulation includes licensing, permits, registration, certification, accreditation, and litigation. The informational regulation group involves disclosure, labelling, performance indications, capability and advice attitude change, behaviour change, nudge, and feedback loops; while structural regulation comprises physical, environmental, process design, and computer-assisted and algorithmic.[212]

In addition, there are many forms of regulation that can be employed. The first is the law to create rules and impose sanctions. It includes statutory law, common law, private law, public law, as well as local law and international law.[213] Law can take many forms, whether primary or delegated legislation and the best way to choose it depends on which type of law is suitable for a particular situation.[214] The traditional concept of regulation was linked to legal rules; legal rules are backed by sanctions, and this mode of

[210] Freiberg and Banks (n 193) 200.
[211] Ibid 200-1.
[212] Ibid 201.
[213] Ibid 203.
[214] Ibid 204.

regulation is commonly connoted with command and control regulation.[215] While the rule is defined as 'a general norm mandating or guiding conduct or action in a given type of situation', the term rule, therefore, is wider than legal rules.[216]

Regulatory rules are not always the best form of regulation. According to Freiberg, there are conditions where rules should not be used or combined with the other forms of rules; for example, when regulatees are more expert than the regulator, when regulatees are better positioned than the legal authority to make the decision, when the regulator rather than regulate the means chooses to seek the outcome and leave the regulatees to choose various alternatives to achieve it.[217] There are other forms of regulation, usually called soft regulation; these are standards, codes of conduct or practice, ethics and values, guidelines, service charters, and policies.[218] Hard law needs to be enforced by the government sanctions through civil, criminal, and administrative law.[219] Hard law is inflexible, slower, and expensive, while soft law is usually faster and less expensive and more flexible with situations and adaptable to change.[220]

It is important to note that regulatory instruments and forms in many common law countries have developed from the focus only on hard law to the various uses of soft law regulation. The emergence of a regulatory state as 'an alternative of the welfare state' in most Western countries has gradually changed the regulatory process to more decentralized authorities and spread decision making to a wider collection of social and economic actors.[221] In France and the UK, in the 1970s, the search for a more efficient regulatory framework encouraged innovation, especially in the area of social regulation.[222] However, in many developed countries, the traditional form of regulation in the regulatory state had often not been successful in solving the real problem.[223] In the US, to promote economic goals and overcome inefficient and 'highly bureaucratized' command-and-control regulation, scholars recommended moving beyond it to

[215] Ibid 206.
[216] Ibid 207.
[217] Ibid 209.
[218] Ibid 210.
[219] Ibid.
[220] Ibid 231.
[221] Christoph Knill and Andreas Lenschow, 'Modes of Regulation in the Governance of the European Union: Towards a Comprehensive evaluation' in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation* (Edward Elgar, 2004) 218, 218.
[222] Giandomenico Majone, 'The Rise of the Regulatory State in Europe' (1994) 7(3) *West European Politics* 77, 84.
[223] Cass R. Sunstein, 'Paradoxes of the Regulatory State' (1990)(2) *The University of Chicago Law Review* 407, 411, 441.

information disclosure and economic incentives,[224] and alternative forms of regulation such as self-regulation or co-regulation.[225] Other scholars have promoted a combination of more than one form of regulation to achieve better regulatory outcomes,[226] as each of the instruments of regulation has its own advantages and defects.[227] Even in today's digital financial sector, scholars continue to innovate and suggest new regulatory innovation such as regulatory technology (reg-tech) and regulatory sandboxes to overcome current regulatory challenges.[228]

Originally coming from developed countries, the regulatory state model may not equally carry the same function in the context of developing countries that have mostly not been prepared to lay down the precondition to embracing the regulatory state model. Phillips asserts in developing countries there is what she calls 'regulation without a regulatory state'.[229] She explains that discussion concerning regulatory states should include the underlying assumptions on which it is premised, including 'political systems, institutions, and modes of economic organization'. Policy makers in developing countries should consider how these underlying assumptions has implications for the national setting in their countries, which differ from the original institutional settings in the developed nations.[230]

Baldwin et al. advise that one should be realistic about what form of regulation can be used, whether to use regulation or leave the market to self-regulate, and what can be expected from the performance of regulation.[231] They add that the regulatory strategies

[224] Richard H. Pildes and Cass R. Sunstein, 'Reinventing the Regulatory State' (1995) 62(1) *University of Chicago Law Review* 1, 10, 97.

[225] Marius Aalders and Ton Wilthagen, 'Moving Beyond Command-and-Control: Reflexivity in the Regulation of Occupational Safety and Health and the Environment' (1997) 19(4) *Law & Policy* 415, 416.

[226] Darren Sinclair, 'Self-Regulation versus Command and Control - Beyond False Dichotomies' (1997) 19(4) *Law & Policy* 529, 552.

[227] See also Gunningham, Sinclair and Grabosky (n 209) 12-15; Neil Gunningham and Darren Sinclair, 'Regulatory Pluralism: Designing Policy Mixes for Environmental Protection' (1999) 21(1) *Law & Policy* 49, 50.

[228] See Dirk A. Zetzsche et al, 'Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation' (2017) 23(1) *Fordham Journal of Corporate and Financial Law* 31, 45. Zetzsche et al. define regulatory sandbox as 'a regulatory "safe space" for experimentation with new approaches involving the application of technology to finance'. See also Douglas W. Arner, Jànos Barberis and Ross P. Buckley, 'FinTech, RegTech, and the Reconceptualization of Financial Regulation' (2017) 37(3) *Northwestern Journal of International Law & Business* 373, 373. Arner et al. discus reg-tech as the use of technology in the regulatory process, including compliance, supervision and reporting.

[229] Nicola Phillips, 'States and Modes of Regulation in the Global Political Economy' in Martin Minogue and Ledivina Carino (eds), *Regulatory governance in developing countries* (Edward Elgar Publishing, 2006) 19, 35.

[230] Ibid 18.

[231] Baldwin, Cave and Lodge (n 191) 130.

should consider difficulties encountered during the implementation of the strategies. Moreover, regulators need to have the capacity to assess new challenges and the performance of the regulation to achieve the optimal outcome, because circumstances may change over time and the regulation should be able to adapt to the new situation.[232] Based on a review of studies in business decision-making in relation to small business regulation, Kitching argues that policymakers need to understand how regulations affect business performance and oversee whether regulation can cause unwanted consequences.[233] They need to highlight 'the interrelationship between regulatory change, business owners' motives, capabilities, actions, and business context'.[234] Idealised models from developed countries should not be transplanted without any attempt to modify them for the context of developing countries.[235] Therefore, whether one country will use command-and-control or other forms of regulation depends on expected performance, the difficulties in implementing them, and the level of compliance and appropriate enforcement mechanism.

While regulatory reform in developed countries has been significantly changed in the past three decades, the speed of reforms in most developing countries has not been as fast as developed countries. Studies show that corruption, ineffectiveness, inefficient bureaucracy, lack of transparency, and unaccountable government have come to characterise most developing countries.[236] Many reforms in developing countries to improve the efficiency of the public sector and the utilization of financial resources, as advocated by international organizations such as the World Bank, have in many cases not

[232] Ibid 132-3. If compared to Freiberg's groups of regulatory methods and regulatory instruments as described above, the term regulatory strategy used by Baldwin et al. refers to the use of varieties of regulatory methods and instruments.

[233] John Kitching, 'A Burden on Business? Reviewing the Evidence Base on Regulation and Small-business performance' (2006)(6) *Environment and Planning C: Government and Policy* 799, 810.

[234] Ibid.

[235] Martin Minogue and Ledivina Cariño, 'Introduction: Regulatory Governance in Developing Countries' in Martin Minogue and Ledivina Cariño (eds), *Regulatory Governance in Developing Countries* (2006) 7.

[236] See for example Jakob Svensson, 'Eight Questions about Corruption' (2005) 19(3) *The Journal of Economic Perspectives* 19, 24; Benjamin Olken, A. and Rohini Pande, 'Corruption in Developing Countries' (2012)(1) *Annual Review of Economics* 479, 481; Augusto López Claros, 'Removing Impediments to Sustainable Economic Development: The Case of Corruption' (2015) 6(1) *Journal of International Commerce, Economics & Policy* 1, 3-4; and Daniel Kaufmann, 'Anticorruption Strategies: Starting Afresh? Unconventional Lessons from Comparative Analysis' in Sahr John Kpundeh and Rick Stapenhurst (eds), *Curbing Corruption: Toward a Model for Building National Integrity* (World Bank, 1999), 42-3.

been achieved.[237] The unsupportive political environment, weak institutional capacities, and shortage of competent civil services have been identified as the main reasons.[238]

The effectiveness of policies and regulatory implementation differs widely across developing countries.[239] Weaknesses in regulatory capacity are caused by under-developed auditing systems, inexperienced judiciary, inadequate budgets for regulators, lack of capable human resources,[240] weak regulatory enforcement[241], corruption and the weak rule of law[242]. Moreover, regulators in developing countries received less pressure from industry, political parties, and social interests than developed countries.[243] Guasch and Hahn suggest that it is essential to increase the capacity to evaluate regulation and choose appropriate regulatory instruments and framework which are compatible with the bureaucratic expertise, the availability of resources, political support, and economic impacts.[244]

Weaknesses of regulatory governance in many developing economies have been identified as a barrier to implementing best practice policies from international organizations. A study of six Asian developing countries found that regulatory practices still have weaknesses which meant that OECD best practices in the area of infrastructure industry could not be directly translated into best practice for Asian developing countries.[245] As a consequence, there was uncertainty about whether or not OECD best practice can be implemented into these countries.[246] The study used six criteria: 'clarity of roles and objectives', autonomy, participation, accountability, transparency, and predictability, to measure these countries against international best practice in terms of the regulatory framework.[247] The study showed that regulation in natural gas and

[237] Ramanie Samaratunge and Nilupama Wijewardena, 'The Changing Nature of Public Values in Developing Countries' (2009) 32(3/4) *International Journal of Public Administration* 313, 321.

[238] Ibid 321, 324.

[239] J. Luis Guasch and Robert W. Hahn, 'The Costs and Benefits of Regulation: Implications for Developing Countries' (1999) 14(1) *The World Bank Research Observer* 137, 152.

[240] Eduardo Araral, 'Policy and Regulatory Design for Developing Countries: a Mechanism Design and Transaction Cost Approach' (2014) 47(3) *Policy Sciences* 289, 295.

[241] Zhang Qing and Anthony Ogus, 'Licensing Procedures in Developing Countries: Should They Be Part of the Set-up Process?' (2006) 29(12) *International Journal of Public Administration* 1091, 1097.

[242] Jean-Jacques Laffont, *Regulation and Development* (Cambridge University Press, 2005) 2-3.

[243] David Graham and Ngaire Woods, 'Making Corporate Self-regulation Effective in Developing Countries' (2006) 34(5) *World Development* 868, 879.

[244] Guasch and Hahn (n 239) 152.

[245] Jon Stern and Stuart Holder, 'Regulatory Governance: Criteria for Assessing the Performance of Regulatory Systems: An Application to Infrastructure Industries in the Developing Countries of Asia' (1999)(1) *Utilities Policy* 33, 48.

[246] Ibid.

[247] Ibid 45.

transport in Indonesia had the lowest score, indicating that the regulatory framework in that area was uncertain and highly unfavourable for private investment.[248] The study concluded that reform of regulatory procedures had not led to a better institutional aspects of regulatory governance.[249]

Nevertheless, implementing best practice, legal harmonization, or standardization may impair the development of an effective legal system.[250] Legal concepts and rules are parts of the legal system which work interdependently; inviting new concepts and rules which are not compatible with the existing legal system can cause parts of it to not develop harmoniously.[251] Moreover, 'law is a cognitive institution', meaning that those who use and interpret the law, such as law enforcers, judges, and lawyers, need to be understood and embrace the law so that it can be effective and essentially change behaviour.[252] Radical changes in the law without continuous adaptation can cause detachment between the users of the law and the law itself. For this reason, borrowing policies from foreign countries without careful consideration concerning how they will be implemented through regulation in developing countries can cause the implementation to be ineffective.[253] In other words, the ability to transfer a borrowed policy from foreign sources into a home country should consider the regulatory capacity[254] and the effectiveness of regulatory governance in the home country.

2.8.2 Regulatory governance to support a policy-oriented approach

Different modes of reasoning in law may affect the outcome of regulation.[255] Parker et al. explain that there are two distinct approaches: 'instrumental, forward-

[248] Ibid 46.

[249] Ibid 48.

[250] Katharina Pistor, 'Standardization of Law and Its Effect on Developing Econonomies' (2002) 50(1) *American Journal of Comparative Law* 97, 98.

[251] Ibid.

[252] Ibid 98, 111-2.

[253] David Parker and Colin Kirkpatrick, 'Researching Economic Regulation in Developing Countries: Developing a Methodology for Critical Analysis' (Centre on Regulation and Competition (CRC) Working papers No. 30646, University of Manchester, Institute for Development Policy and Management (IDPM), 2002) 1, 20 <https://ageconsearch.umn.edu/record/30665/>.

[254] See Colin Scott and Ciara Brown, 'Regulatory Capacity and Networked Governance' (ECPR Biennial Conference paper, 2010) 1, 3 <http://www.regulation.upf.edu/dublin-10-papers/1I2.pdf>. Colin and Brown define regulatory capacity as "… the sum of the resources available to actors within regulatory regimes for getting things done, and these resources are typically spread, not only amongst state bodies, such as government departments, regulatory agencies and courts, but also between state and non-state actors."

[255] Christine Parker et al, 'Introduction' in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 4. See also Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard University Press, 1990) 126-7. He explains the difference between the backward and forward-looking interpretation which have been used by the US Courts and criticizes that the use of

looking, or policy-oriented ways of thinking and backward-looking, principled, or rule-based doctrinal reasoning'. The former emphasizes the law as the tool of society, while the latter believes in 'the autonomy of legal reasoning from society'.[256] They explain that the courts in the US have long been known to favour the instrumental approach or forward-looking rather than legal reasoning, even when instrumental legislation is absent. In addition, legislation can be used to reinforce the general principles developed by common law.[257]

Hoecke, on the other hand, explains that although judges in practice might want to decide a case based on the desired outcome, they are bound by the established principles or doctrine in law. Even if they are going to overcome, it is a risky decision which might be overruled by the appealed court or the court of cassation. He asserts that:[258]

> This may show how diverging rules and doctrinal constructions may lead to similar decisions or how similar rules and/or doctrinal constructions may lead to diverging practical solutions. The main reason for this is that, especially in hard cases, judges first see a desirable solution for the case at hand, which, afterward, they try to construct on the basis of the legal tools available within their legal system. However, the specific doctrinal constructions of a legal system and/or underlying paradigmatic views may block certain outcomes and facilitate other ones ….

Collin emphasises several points that are important for assessing whether the governance of regulation is adequately framed to facilitate effective commercial transactions.[259] First, the rules which govern market transactions can function effectively, so there are no unnecessary 'costs on market transaction', remove all burdens in potentially profitable transactions, and prevent rogue traders, which can be detrimental to maintain confidence in the market. Second, the effectiveness of laws concerning market transactions can be increased to address the regulatory competition among the countries and globalization, which, if it does not meet expectations, could potentially drive business and investment to foreign countries. Third, whether the regulation of market transactions contributes to the production of social welfare. Lastly, whether the contract law, which is controlled under 'transnational legal orders', is 'an acceptable scheme of social justice'.

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purposive interpretation which might lead to serious problems due to changing circumstances when a court decision is made which differs with the assumptions of the legislature.

[256] Parker et al (n 255) 4.

[257] Ibid.

[258] Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) 12 *Law and Method* 1, 22-3.

[259] Hugh Collins, 'Regulating Contract Law' in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 14-5.

2.8.3 Regulatory failure

Regulations may fail to address, either entirely or partially, their intended objectives for several reasons. The first is 'the inherent uncertainty and ambiguity of knowledge'[260] which limits our understanding of the cause and effect of regulatory intervention, and why in particular places and particular times it can be effective and in others ineffective.[261] The strategy to overcome this limitation is to apply 'incremental trial-and-error approaches' to choose a better regulatory intervention, rather than applying grand schemes.[262]

The second cause of regulatory failure is a lack of awareness about 'competing or complementary regulatory system[s]' where the government may not be the sole authority in certain regulatory areas.[263] Adaptation to new circumstances such as change of technology and innovation may also cause regulatory failure when existing regulations become out-dated.[264]

The third reason for regulatory failure is under-inclusive and over-inclusive regulation. Ogus explains that crude drafting can cause 'the hostility of those unintentionally caught by provisions, and under-inclusiveness, leads to avoidance behaviour by those intended to be caught'.[265] As a response to these conditions, 'many areas of regulation underwent an evolutionary process, statutory definitions requiring a constant amendment to meet the more obvious deficiencies'.[266] In response to under-inclusiveness, the identified conduct or subjects should be included in the regulation, while in response to over-inclusiveness, the regulation should be relaxed from the unintended control and subjects or behaviours.[267] However, the nature of rules, as Black explains, is inherently under-inclusive and over-inclusive and they are 'vague and indeterminate'.[268] The reason why inclusiveness occurs, according to Black, are:[269]

> First, as noted, the generalization which is the operative basis of the rule inevitably suppresses properties that may subsequently be relevant or includes properties that may in some cases be irrelevant. Secondly, the causal relationship between the event and the harm/goal is likely to be only an approximate one: the generalization bears simply a

[260] Baldwin, Cave and Lodge (n 191) 74-5.
[261] Ibid.
[262] Ibid.
[263] Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 74-5.
[264] Sunstein (n 255) 94-5.
[265] Ogus (n 209) 6.
[266] Ibid.
[267] Baldwin, Cave and Lodge (n 191) 69-70.
[268] Black (n 209) 6.
[269] Ibid 8.

> probable relationship to the harm sought to be avoided or goal sought to be achieved. Thirdly, even if a perfect causal match between the generalization and the aim of the rule could be achieved, future events may develop in such a way that it ceases to be so.

Thus, inclusiveness does not mean failure. The success and failure of rules, especially regulatory rules, depends on whether they accomplish their intended function to perform 'social management and instrumental functions' and to achieve pre-determined policies.[270] Likewise, Scott asserts that '[a] rule should apply to all the circumstances within the intent of the policymaker and to none that fall outside that intent'.[271] The precision of rules is always desirable since it can encourage 'socially desirable behavior' while discouraging socially undesirable behavior.[272] Nevertheless, Black suggests that over and under-inclusiveness can lead to the regulation being unable to achieve its aims. What matters is that regulatory drafters should assess whether the regulations are still relevant to the context and circumstances and amend them to improve precision.

The other reasons for regulatory failure are poor design caused by failure to identify the problems and targets of regulation, ineffective implementation resulting from lack of resources to monitor and enforce them, 'ambiguous rules or laws' produced by lack of clarity of interpretation that leads to possible avoidance or non-compliance of conduct or activities, and procedural injustice caused by unfair enforcement of the rules which may influence the attitude or motivation of affected parties towards non-compliance.[273] It is clear that one or more of the reasons for regulatory failure may be a consequence of other reasons. However, since it is not always clear which reason will be a sign of failure regulatory drafters need to synchronise the intended aims of the regulation, its substance, and the development of targeted behaviours and societies.

2.9 Legal Transplant

Given the importance of equity crowdfunding which is gaining momentum in other markets around the world, it is necessary for developing countries such as Indonesia to learn from more advanced countries. Legal transplant[274] can be a useful way to

[270] Ibid.

[271] Colin Scott, 'Standard-Setting in Regulatory Regimes' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 1st ed, 2012) 108.

[272] Black (n 209) 10.

[273] Freiberg and Banks (n 193) 489-92.

[274] Legal borrowing and legal transplant are used interchangeably in this thesis. There are other terms, such as legal transfer, legal harmonization, unification of law, legal irritant and legal transposition, which have been used by scholars to express a similar notion of the using of foreign law or regulation by a country to solve a particular problem or to export legal reforms from foreign sources. See John Gillespie,

introduce legislative reform to regulate equity crowdfunding by borrowing and comparing legal practices from other jurisdictions.

The idea of borrowing law from another country is not a recent phenomenon. According to Watson, it is common for a country to borrow laws from other countries or jurisdictions as a vital instrument in developing its own laws[275] but they should consider their existing conditions. He asserts that 'legal borrowing' may not appropriately connect to their people and laws which were appropriate at the time they were developed. Therefore, he suggests that any legal borrowing should be selected for 'sound reasons' and be suitable for 'its new environment'.[276]

The notion that laws from different legal families can be transplanted to a national legal system has become a concern for many policymakers in supporting countries to pursue political or economic reforms, social changes, and other agendas.[277] For example, the World Bank is paying more attention to the literature on legal transplants to complement research on economic and political change.[278]

However, Legrand negates the concept of legal transplant if the meaning is to import law to a new location because 'the very constitution of law is as law-in-situation'. He argues that the imported law should be fine-tuned to local circumstances to prevent it from failing to operationalize in its new environment.[279] Based on the assumption that law is a social construct, opponents of legal transplant argue that they cannot survive where the law is different, because it will lose its original meaning and be dislocated from its context.[280]

It should be noted that the idea that legal transplant cannot survive without adaptation with local circumstances, which is also relevant with how one view the characteristic of the law itself. Law can be characterized as 'law as a static and law as a dynamic (evolving) legal order'.[281] The view that law is static describes law as timeless

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'Towards a Discursive Analysis of Legal Transfers into Developing East Asia' (2007) 40(3) *New York University Journal of International Law and Politics* 657, 664-5.

[275] Alan Watson, *Society and Legal Change* (Philadelphia : Temple University Press, 2001) 98.

[276] Ibid 98.

[277] Michele Graziadei, 'Legal Transplants and the Frontiers of Legal Knowledge' (2009)(2) *Theoretical Inquiries in Law* 723, 727-8.

[278] Ibid.

[279] Pierre Legrand, 'Negative Comparative Law' (2015) 10 *Journal of Comparative Law* 405, 438-9.

[280] Graziadei (n 277) 728.

[281] Richard Nobles and David Schiff, 'Introduction' in Richard Nobles and David Schiff (eds), *Law, Society and Community* (Ashgate, 2014) 9.

and static understanding; in contrast, law can also be described as having the characteristics of changing and dynamic[282], that law is 'a product of evolution'.[283] The following subsection explain the types and process of legal transplant, as well as the developing countries' experience concerning legal transplant and its adaptation with local institutions.

2.9.1 Types of legal transplants

Watson identifies four factors which influence transplanting laws from other countries. The first is 'the general respect in which it is held', such as a strong political power or cultural supremacy of the borrowed law; for example, the influence of Roman law in many other countries in common and civil law systems, and the influence of German law in Japan.[284] The second reason is national pride. For example, a country chooses to borrow another country's legal systems because it conforms with the borrower's legal principles and practices.[285] The third reason is 'language and accessibility', such as the US adoption of 'Blackstone's Commentaries on the Laws of England' largely because of the accessibility of the sources written in English. The last reason is history. For example, most Asian and African countries adopt the common or civil law system of their former colonisers.[286]

The motivation for legal transplant is vital since 'it affects demand' and the effect on the legal community who interprets and enforces the law.[287] Milhaupt and Pistor identify four reasons for legal transplants.[288] First, it is cheaper and faster to imitate what has been successful and has been 'market-tested' in developed countries. This type of motivation is analogous to the transfer of technology from home countries to host countries. Second, is political motivation due to colonization or foreign military occupation, as occurred in South Korea during the Japanese occupation. Third, signaling motivation indicates that the quality of the legal and governance in the host country is

[282] Sanne Taekema and Wilbren van der Burg, 'Towards a Fruitful Cooperation between Legal Philosophy, Legal Sociology and Doctrinal Research: How Legal Interactionism May Bridge Unproductive Oppositions' in Richard Nobles and David Schiff (eds), *Law, Society and Community* (Ashgate, 2014) 131.

[283] E. Donald Elliot, 'The Evolutionary Tradition in Jurisprudence (1985) 1 (1) *Columbia Law Review* 38, 72.

[284] Watson (n 275) 98-9.

[285] Ibid 102.

[286] Ibid 105.

[287] Curtis J. Milhaupt and Katharina Pistor, *Law and Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development around the World* (University of Chicago Press, 2008) 210.

[288] Ibid 209-10.

equal to that of the home country; for example, the use of Delaware's judicial standard by Japan to signal that the country had adopted the 'global standard' in its system. Fourth, blind copying motivation, occurs when a country hastily borrows and uses legal rules from other countries without 'adequate preparation or familiarity'; for example, when Columbia copied and enacted the 'Spanish Commercial Code 1829'.

Miller earlier developed four types of legal transplant: "i) the Cost-Saving Transplant; ii) the Externally-Dictated Transplant; iii) the Entrepreneurial Transplant; and iv) the Legitimacy-Generating Transplant" and argued that most legal transplants have a mix of these four elements.[289] The Cost-Saving Transplant is used if legislative drafters or judges take a solution that has proven to be workable in other countries to save time and resources.[290] Since the drafters have not considered if the transplanted rules are suitable for local conditions, the result might have little connection to the recipient societies.[291] Miller includes functionalism in this category[292] which examines the substance of the function of the rules in the two legal jurisdictions and considers whether a foreign norm can function in the borrower's legal system.[293] Although cost-saving can increase the prestige of borrowing advanced regulation and is often used by developing countries for environment and health and safety regulation, this type of transplant does not have same success as in the developed countries.[294]

The externally dictated transplant is motivated by the recipient countries' willingness to transplant norms because of the demand from other countries, entities, or organizations.[295] An example of this type of transplant is when the US, the IMF, and the World Bank demanded that developing countries reform laws as a pre-condition for loans.[296] The entrepreneurial transplant is initiated by individuals or groups who encourage foreign norms to be transplanted so that the home country can obtain 'political or economic benefits'.[297] The difference between this and the externally dictated transplant is that in the previous type the donor country facilitates legal reforms rather

[289] Jonathan M. Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' (2003) 51(4) *The American Journal of Comparative Law* 839, 842.
[290] Ibid 845-6.
[291] Ibid.
[292] Ibid.
[293] Ibid.
[294] Ibid.
[295] Ibid 847.
[296] Ibid.
[297] Ibid 849-50.

than them being a pre-requisite for loans or grants.[298] These reforms may be a development program to train legal practitioners in a new law.[299]

The legitimacy-generating transplant is motivated by the prestige of foreign legal institutions or legal systems.[300] This model is widely criticized because its success in developed countries does not make it suitable because of the different legal and social structures in borrowing countries.[301] However, the proponents of this model argue that it may provide authority for the legislators or the judges.[302]

At the practical level, it is now common for drafters to borrow policies, legal institutions or legal solutions from foreign sources such as other countries, the EU or international organizations, to develop faster and effective legislation.[303] The law can be regarded as an institution in itself that influences and informs other institutions.[304] Hodgson defines institutions 'as an integrated system of rules that structure social interactions'.[305] He then explains that rules in this definition 'include norms of behaviour and social conventions, as well as legal rules' and that the form of institutions can be an organization or a system of language, traffic convention, and law. As an important commercial institution, the law provides an indicator of the orientation of a country's commercial policy.[306] This perspective of law as an institution simplifies the boundaries between legal and non-legal institutions, and how law can interact with other institutions.

2.9.2 Developing countries' specific interests

The interests of developing countries sometimes do not align with global policy. As an illustration, in intellectual property protection most successful countries historically have amended their intellectual property rights (IPR) to reflect the different stages of their economic development.[307] Therefore, global policy which promotes the homogenization of IPR compliance and enforcement, such as the Agreement on Trade-

[298] Ibid 854.
[299] Ibid.
[300] Ibid.
[301] Ibid 854-5.
[302] Ibid 856.
[303] Helen Xanthaki, 'Legal Transplants in Legal Legislation: Defusing the Trap' (2008)(3) *International and Comparative Law Quarterly* 659, 659.
[304] Philip M. Nichols, 'A Legal Theory of Emerging Economies' (1998) *Virginia Journal of International Law* 229, 247.
[305] Geoffrey M. Hodgson, *Conceptualizing Capitalism : Institutions, Evolution, Future* (University of Chicago Press, 2015) 501.
[306] Nichols (n 304) 234.
[307] Garrett Halydier, 'A Hybrid Legal and Economic Development Model that Balances Intellectual Property Protection and Economic Growth: A Case Study of India, Brazil, Indonesia, and Vietnam' (2013) 14(1) *Asian-Pacific Law & Policy Journal* 86, 96.

Related Aspects of Intellectual Property Rights (TRIPS)[308], can potentially restrict economic development in both the least developing countries (LDC) and developing countries.[309] Halydier's study on economic and law literature in four developing countries: Indonesia, Vietnam, India, and Brazil shows that implementing an IPR policy on a global scale is not a wise option since it can increase economic costs in the LDC and developing economies. In the long term, it might decrease global economic growth.[310] Therefore, Halydier argues that developing countries should adopt the IPR regime appropriate for its economic development in order to promote expansion of domestic industries by reducing production and testing costs, rather than imitating developed countries.[311] Forsyth advocates that regulators of intellectual property in developing countries include 'customary law and informal practices' to complement existing regulatory instruments because these play a critical role in the property law system in many developing countries.[312] Therefore, developing countries should consider to what extent they pursue harmonization with global policy regimes rather than developing their own economic interests and development.

Miller observes that the use of legal transplants in developing countries has increased significantly due to globalization, economic development, and democratization.[313] To attract international investment and actively engage in international trade, many countries have imported some foreign or international standards which are considered imperative.[314] Likewise, many environmental protection, human rights, and anti-corruption programs sponsored by international institutions or governments have significantly encouraged the process of legal transplants in recipient countries.[315]

One of the crucial elements in the failure to adopt corporate governance in Indonesia is its legal culture which can affect 'corporate governance behaviour'.[316] Tabalujan refers to patrimonialism, the notion that the authority in a 'social, business or

[308] Ibid 96.
[309] Ibid 97.
[310] Ibid 92, 145.
[311] Ibid.
[312] Miranda Forsyth, 'Making the Case for a Pluralistic Approach to Intellectual Property Regulation in Developing Countries' (2016) 6(1) *Queen Mary Journal of Intellectual Property* 3, 4.
[313] Miller (n 289) 839-40.
[314] Ibid 840.
[315] Ibid.
[316] Benny S. Tabalujan, 'Why Indonesian Corporate Governance Failed--Conjectures Concerning Legal Culture' (2001) 15(2) *Columbia Journal of Asian Law* 141, 165.

political context' is based on the ruler who exercises personal power similar to a father-figure in a family, which tends to affect many aspects of businesses in Indonesia. Hence, the success of any law reform will depend not only on sound institutions but also on the behaviour of the people, businesses, or supervisors who are the institution's stakeholders.[317] Likewise, Daniel argues that the adoption of OECD Principles of Corporate Governance in Indonesian regulations and the code had been unsuccessful because the government undermined the role of the legal culture.[318] Undermining patrimonialism can cause the government to fail to implement new regulations.[319] He suggests that involving sociologists and anthropologists as experts in the process of regulatory drafting would enhance the acceptance of new laws in society.[320]

Another example was Indonesia's effort to implement the World Bank best practice of private sector participation (PSP) in the Trans-Java Expressway infrastructure project. It was necessary to lower expectations of implementation of best practice in PSP due to lack of the 'rule of law, regulatory authority, and fiscal space'.[321] In reality, the relevant laws which were crucial for the implementation of PSP best practice were in place and efforts to reform existing policy led to stagnation.[322]

An earlier example was Indonesia's attempt to adopt the Dutch administrative legal system in the Indonesian Law Number 5 of 1986 concerning the Administrative Court. Bedner identified several obstacles to the transplant process in Indonesia.[323] First, the judges tended to rely on the legislation and were unfamiliar with using precedents which led them to 'reinvent the wheels' and weaken legal consistency. Second, the lawyers, as the members of the bar, based their legal arguments on textbooks and legislation, due to lack of access to previous court decisions.[324] Third, in the absence of court decisions and other legal sources such as 'minutes of parliament', most law schools taught their students law that was highly theoretical and superficial, rather than train them

[317] Ibid 166.

[318] William E. Daniel, 'Corporate Governance in Indonesian Listed Companies - A Problem of Legal Transplant' (2003) 15(1) *Bond Law Review* 345, 371.

[319] Ibid.

[320] Ibid.

[321] Jamie S. Davidson, 'Driving Growth: Regulatory Reform and Expressways in Indonesia' (2010) 4(4) *Regulation & Governance* 465, 480.

[322] Ibid.

[323] Adriaan Bedner, 'Indonesian Legal Scholarship and Jurisprudence as an Obstacle for Transplanting Legal Institutions' (2013) 5(2) *Hague Journal on the Rule of Law* 253, 256-7.

[324] But see Mark J. Roe, 'Legal Origins, Politics, and Modern Stock Markets' (2006) 120(2) *Harvard Law Review* 460, 469. He explains that contrary to the common law system, judges in civil law countries do not follow prior judges' decisions and often the reasoning of the decisions is not written.

to solve legal problems with wide-ranging sources. In reality, transplanting a set of a legal institutions in Indonesia could overwhelm activities such as appointing suitable judges, determining the court's jurisdictional boundaries, and establishing a set of 'rules, principles and values' which will be embedded into the legal system.[325]

Bedner's claim that Indonesian courts are not familiar with precedents is incorrect. It is common in the civil law system that judges do not follow the decisions of previous courts.[326] However, there are informal systems that resemble a 'non-binding system of precedent'.[327] In the appellate court, judges follow '*yurisprudensi'*, 'prominent decisions of the Supreme Court', which are usually highly persuasive.[328] Departing from *yurisprudensi* can cause their decisions to be vulnerable to annulment or reversal by the Supreme Court. Nevertheless, to contend that Indonesian judges follow *yurisprudensi* in the way that common law judges follow precedents is inaccurate.[329]

In developing countries any law reform concerning 'new laws or institutions' can be a time-consuming process[330] and may achieve different objectives from those intended, especially when the reform is conducted hastily. For example, when the IMF asked Indonesia to implement 'a modern legal infrastructure' to improve the stability of local 'economic, social and political stability', as a prerequisite for financial aid in the 1998 Indonesian economic crises,[331] the law reform was absorbed into the ineffective existing model and political system.[332] This was not extraordinary, since the final result of legal reform in many southeast Asian countries is often a product of compromise among stakeholders in local ministries, political parties and regional interests.[333] For instance, the implementation of the Indonesia Commercial Court and the Indonesia Competition Commission was unable to establish better governance; rather they were absorbed into the previous ineffective system.[334]

In the area of intellectual property rights, Saidin explains that Indonesia has enacted Law No. 28 of 2014 on Copyright to amend Law No. 19 of 2002 to accommodate

[325] Bedner (n 323) 267.
[326] Timothy Lindsey and Simon Butt, *Indonesian Law* (Oxford University Press, 2018) 74.
[327] Ibid.
[328] Ibid 74.
[329] Ibid 75.
[330] Tim Lindsey, 'Legal Infrastructure and Governance Reform in Post-Crisis Asia: The case of Indonesia' (2004) 18(1) *Asian-Pacific Economic Literature* 12, 34.
[331] Ibid.
[332] Ibid.
[333] Ibid 35.
[334] Ibid.

the international standard as set by the GATT/WTO of 1994 and the TRIPs Agreement.[335] The new law is a legal transplant of this international standard into the Indonesian legal framework is a policy choice to comply with international conventions.[336] Saidin quotes Robert B. Seidman and Ann Seidman's observation that the behaviour of people is not only influenced by the law, but also social, economic, political, physical and subjective factors which are influenced by the 'custom, geography, history, technology, and non-legal factors'.[337] He asserts that any new law will face obstacles in its implementation, [338] and the new law may have many weaknesses. He recommends that policymakers use the feedback from law enforcement and other 'non-legal aspects' to refine legal policies for future amendment of the law. For example, despite enactment of new laws, piracy of copyright and cinematographic works is still widespread in many major cities.[339]

However, not all foreign legal regulations are adopted in laws or regulatory rules. Sundari argues that Indonesia has adopted the legal concept of the US's citizen lawsuit not in formal law, but in judicial practice.[340] While there is no legislative provision concerning the citizen lawsuit in Indonesia, there have been several cases using the US model, such as Munir cs against the Indonesian Government and the Indosat divestment policy case.[341] In Indonesia, there were seven citizen lawsuits from 2003 to 2011[342] ranging from human rights and environmental issues to fuel prices and general elections. However, lack of statutory guidance led to inconsistency and unpredictability in lawsuits.[343] While the model adopted still co-exists with the conventional judiciary model, judges are not bound by previous court decisions.[344]

Mahy argues that the development of company law in Indonesia has not followed consistent with Dutch law from which it originated. Instead, Indonesian company law developed its own path.[345] Although the new company law of 1995

[335] O. K. Saidin, 'The Choice of Foreign Legal Transplants Policy in Regulating Indonesian Copyright Law: Between Standardization and Coagulation' (2016) 27(3) *Mimbar Hukum* 504, 506.
[336] Ibid 512.
[337] Ibid 511.
[338] Ibid 509.
[339] Ibid 513.
[340] Elisabeth Sundari, 'The Indonesian Model of the Citizen Lawsuit: Learning How to Adopt and How to Adapt' (2018) 21 *International Trade and Business Law Review* 323, 328.
[341] Ibid.
[342] Ibid 329.
[343] Ibid 330.
[344] Ibid.
[345] Petra Mahy, 'The Evolution of Company Law in Indonesia: An Exploration of Legal Innovation and Stagnation' (2013) 61(2) *The American Journal of Comparative Law* 377, 432.

incorporated many common law concepts such as 'piercing the corporate veil', the 'business judgment rule' and 'derivative action', it still retained Dutch concepts such as minimum capital and the board of commissioners as an organ of the company.[346] The 2007 amendment of the company law still preserved some Dutch concepts but introduced 'a mandatory legislative requirement' for certain companies, which differs from the voluntary 'corporate social responsibility' (CSR) principal in most Western company law.[347] Mahy argues that the development of Indonesian company law is an example of a deviation from 'Pistor et. al.'s division of "origin" and "transplant" countries.[348]

In summary, the experience of transplanting foreign laws into Indonesia, as in other countries has not always been successful.[349] Inconsistency in legal transplant does not mean that it has failed but may reflect that the process of legal transplants depends on many elements that should be evaluated during the implementation process. Based on the previous attempts of legal transplant in Indonesia as has been explained above, some factors that might influence the successful of legal transplant in Indonesia are legal culture, particularly patrimonialism[350], lack of rule of law and regulatory authority[351], little connection between the transplanted law with local institution[352], absorbed into ineffective existing system[353], refinement the new law to adapt with the implementation's obstacle[354], and the ability to co-exist with existing legal institutions[355].

2.9.3 The legal transplant processes

Xanthaki explains that during the transplant process the drafting teams borrow concepts, legal texts, or policy options and make decisions to include or exclude the foreign term.[356] The issue is whether the borrowed concepts or rules are comparable to national legal systems, although the aim is to solve a similar social problem.[357]

[346] Ibid 412. See also Henri Gunanto, 'The Impact of U.S. Law Propositions on Indonesian Commercial Law' (1995) 29(3) *Loyola of Los Angeles Law Review* 1047, 1054. Gunarto gives an illustration of how the doctrine of 'piercing the corporate veil' in the US has been transplanted into the article 3 para 3 Law No. 1 of 1995 on Company Law with slight modification.
[347] Mahy (n 345) 416.
[348] Ibid 432.
[349] Samaratunge and Wijewardena (n 237) 321.
[350] See Tabalujan (n 316) 165.
[351] See Davidson (n 321) 480.
[352] See Bedner (n 323) 256-7.
[353] See Lindsey (n 330) 34.
[354] See Saidin (n 335) 513.
[355] See Forsyth (n 312) 4; Sundari (n 340) 328; Mahy (n 345) 432.
[356] Xanthaki (n 303) 663.
[357] Ibid 666.

The functional concept has several advantages, such as addressing the social problem by borrowing from foreign terms to enrich the legislative drafters with policies and legal solutions that 'enable innovative choices of policy and law'. However, functional concepts have been criticized by other scholars[358] as too broad and based on a vague relationship between legal norms and social problems[359] because it is difficult for legal experts to address the causal relationship between the two elements.[360]

Xanthaki has criticized this argument, explaining that multi-discipline qualifications support the policymakers' task to find solutions to society's needs.[361] Modern law reforms require a multi-disciplinary approach to ensure that the needs of society are properly addressed [362] and many law reform commissions around the world employ non-lawyers.[363] Therefore, the dichotomy in the views of scholars about legal transplants, between the proponents of functionalism and the scholars who criticize it, is not such a black and white division.

To what extent drafters of legislation should explore policy choices, concepts or legislation that will be transplanted into another country legal system, depends on how the legislative drafters prevent inappropriate borrowing of foreign norms, which may end in ad hoc consultancies for the operation of transplanted law.[364] In other words, the legislative drafters must anticipate whether the new legislative products can be effectively operated and understood by local society, including law enforcement agents. However, according to Graziadei, the literature on how the individual agencies produce legal change is scarce.[365]

There are differences between developed and developing countries in choosing what best serves their interest. Developed nations tend to use the legitimacy-generating transplant or the entrepreneurial transplant when drafting legislation and choose a familiar legal system, for example, as an instrument to assess harmonization with the international practice.[366] Developing countries, on the other hand, tend to opt for a cost-saving or externally dictated transplant since the initiative for transplanted law

[358] Ibid 666-7.
[359] Ibid 667.
[360] Ibid.
[361] Ibid.
[362] Ibid.
[363] Ibid 668.
[364] Ibid 660.
[365] Graziadei (n 277) 729-30.
[366] Xanthaki (n 303) 660.

commonly comes from foreign countries.[367] However, Xanthaki suggests that in the initial stage the drafting teams can use functional concepts as generic transplant concepts and at a later stage the teams continue with intentional concrete concepts.[368]

According to Xanthaki, proper design in comparative transplant research should include internal and external validity.[369] Internal validity concerns whether the study's facts are correctly chosen within the context of the research questions. For example, in comparing unemployment benefits in several different countries, the compared countries must have similar welfare systems. Otherwise, the study result will be internally invalid because it may lead to incomparable policies or legal norms. External validity concerns the outcome of a research study which should be applicable to the other cases that have similar conditions set by 'the transplant research questions' and 'the transplant research designs'. Although these two types of validity are inter-connected, in practice they are rarely achieved.[370] Xanthaki explains that the comparatists should use case studies that 'can be used as the basis of an argument or conclusion which may apply in more than one legal system', to achieve internal and external validity.[371] The researcher should explain how the facts are chosen and how they relate within the framework of the research questions, and whether the study is applicable to other similar cases.

2.9.4 The effectiveness of legal borrowing/transplant

When a country transplants laws from foreign countries they often cannot fulfill their intended purposes [372] because they need adjustment to fit the new context to prevent their failure.[373] This failure can waste resources and may create a false impression that the legislation has addressed the problem adequately.[374] A process of domestication is necessary to adapt the foreign norms to the recipient's social, economic, and political construct and ensure that the legal transplant can achieve its purpose.[375]

The efficacy of legal borrowing from another country has not been well explained by theories. Watson, Garoupa and Ogus criticize theories of how the legal

[367] Ibid 660.
[368] Ibid 668.
[369] Ibid 670.
[370] Ibid.
[371] Ibid.
[372] Ibid 659.
[373] David Nelken, 'Towards a Sociology of Legal Adaptation' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart, 2001) 13.
[374] Xanthaki (n 303) 659.
[375] Graziadei (n 277) 728-29.

system of one country differs from another as lacking discussion of economic explanations.[376] Berkowitz, Pistor, and Richard argue that effective legality of borrowing law from other countries is affected by the internal legal order of the home-country, the adaptation process of the transplanted law, and the familiarity of the home country with the basic principles of the transplanted law.[377] In this case, they define legality as 'the importance of enforcement and effective legal institutions'.[378] They suggest that the strategy of legal reform should be to improve legal rules which will be understood by the final users, such as home-country legislators, economic agents, and law enforcement agents.[379] Thus, economic development is affected by the ability to adapt the borrowed law from other countries to home country conditions; effective legal reforms improve legality and subsequently over time will increase economic development.[380] Two important key notions for transplanting law to be effective are:[381]

> First, … it must be meaningful in the context in which it is applied so citizens have an incentive to use the law and to demand institutions that work to enforce and develop the law. Second, the judges, lawyers, and other legal intermediaries that are responsible for developing the law must be able to increase the quality of law in a way that is responsive to demand legality.

In other words, financial markets will suffer when legal reforms are introduced without credible law enforcement.[382] This could happen when the transplanted law is not well-suited to the underlying legal tradition and the specific local conditions.[383] Based on their analysis of a transition economy such as Russia, Pistor et al. suggest that a strategy to improve legal effectiveness is essential for 'the law in book' to significantly impact on economic development.[384] As an illustration, although Russia reformed its corporate governance to increase external finance, it is still difficult for it to have advanced development of its financial market in the near future.[385] Pistor et al. conclude

[376] Nuno Garoupa and Anthony Ogus, 'A Strategic Interpretation of Legal Transplants' (2006) *Journal of Legal Studies* 339, 340.

[377] Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, 'Economic Development, Legality, and the Transplant Effect' (2003) 47(1) *European Economic Review* 165, 167.

[378] Ibid 166.

[379] Ibid 192.

[380] Ibid 181, 192.

[381] Ibid 166-7.

[382] Katharina Pistor, Martin Raiser and Stanislaw Gelfer, 'Law and Finance in Transition Economies' (2000)(2) *The Economics of Transition* 325, 328.

[383] Ibid 328.

[384] Ibid 348.

[385] Ibid 356.

that 'good laws cannot substitute for weak institutions'.[386] Similarly, Aldashev argues that:[387]

> … understanding the economic effects of the substantive law (at least in the area of entry regulation) requires going beyond simple comparisons of laws 'on the paper': one needs to take into account the complex interactions of the substantive law with other institutional characteristics and laws in other relevant economic areas.

2.10 Legal System and Investor Protection

The rights of equity owners and their protection is a potential determinant of investors' readiness to finance firms.[388] Therefore, legal rules and law enforcement must be effective in corporate finance.[389] La Porta, Lopez-de-Silanes, Shleifer, and Vishny (LLSV) found that compared with the common law countries, civil law countries, investor protection is weaker and the capital markets are less developed.[390] Although the law and the quality of the enforcement vary across civil and common law countries, LLSV suggest there are corporate governance mechanisms other than the legal rule as a substitute for weak law enforcement. These mechanisms may be incorporated in or separate from the law.[391] A further reaction to weak law enforcement is a concentration of ownership which can provide incentives for managers to work and encourage large investors to monitor the managers.[392] LLSV argue that the concentration of ownership results from large investors needing more capital to own more equity so that expropriation by managers can be avoided.[393] The other reason is that when small investors think investor protection is inadequate, they might consider buying shares at a low price and leads to disincentives for firms to offer new shares to the public.[394] In other words, the lack of legal protection for shareholders constrains the supply of finance from minority shareholders[395] and the concentration of ownership is the substitute for weak investor protection.[396]

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[386] Ibid.
[387] Gani Aldashev, 'Legal Institutions, Political Economy, and Development' (2009)(2) *Oxford Review of Economic Policy* 257, 261.
[388] Rafael La Porta et al, 'Law and Finance' (1998) 106(6) *Journal of Political Economy* 1113, 1114.
[389] Ibid.
[390] Ibid 1116.
[391] Ibid.
[392] Ibid.
[393] Ibid 1145.
[394] Ibid.
[395] Pistor, Raiser and Gelfer (n 382) 326.
[396] La Porta et al (n 388) 1145.

LLSV claim that in principle weak rules can be substituted by 'a strong system of legal enforcement', since an effective court system can rescue investors from abusive management behavior.[397] However, this may not apply to all the legal systems in various other countries. Pistor, Raiser, and Gelfer's study on stock market development of transition economies reveals that legal reforms in transition economies such as Russia may have investor protection on the books similar to the level on the developed economies. However, the development of financial markets in transition countries is unlikely to match those in developed countries.[398] The lack of effective legal institutions constrains financial market development in transition countries.[399] They explain that the efficacy of legal institutions was influenced by the history of how these countries modernized the legal order after World War I. Countries which failed to establish an effective modern legal order are still affected by this problem.[400] One of the causes was that many transition economies had to embrace modern law, especially civil and commercial law, without considering whether local conditions could adapt to these transplanted laws.[401] Therefore, they suggest that legal reforms and the use of transplanted laws should consider how the country can use the legal order effectively, which might influence the effectiveness of the laws.[402] The explanation of Pistor, Raiser, and Gelfer suggest that a legal institution's efficacy as a whole is the determinant of the effectiveness of the legal reforms, rather than solely the law enforcement.

Cruz also asserts that the history of the legal order is important and modern comparative law recognizes the 'relationship between law, history, and culture'. It operates on the foundation that the legal system combines interweaving elements of historical events that build up the national character of a country.[403] Therefore, legal history is an important component in evaluating law and legal concepts.[404]

2.11 Does Legal Origin Matter in the Legal Transplant Process?

Legal origin has been heavily criticised. Legrand challenges the view that some laws, according to their legal origin, are more efficient than those based on several

[397] Ibid 1140.
[398] Pistor, Raiser and Gelfer (n 382) 356.
[399] Ibid.
[400] Ibid.
[401] Ibid.
[402] Ibid 357.
[403] Peter De Cruz, *Comparative Law in a Changing World* (Routledge-Cavendish, 3rd ed, 2007) 6.
[404] Ibid 10.

econometric indicators.[405] Armour, Deakin, Mollica, and Siems criticize the legal origins hypothesis. They tested the legal origins hypothesis with time series data from twenty-five developed, developing, and transition countries between 1995 and 2005. They found that although there was legal convergence among the countries concerning the legal support for economic development as advocated by the World Bank, there was a weak relationship between legal convergence and economic growth as predicted by the legal origins hypothesis.[406] They suggest that legal reform is not an independent variable that can be seen as exogenous to economic development. Instead, it is an endogenous variable interlinked with economic conditions and the country's political environment.[407] Katelouzou and Siems found that, all legal systems have strengthened shareholder protection, irrespective of legal origin and the level of economic development.[408] The study was based on a leximetric dataset from 1990 to 2013 on the development of shareholder protection from common law, French civil law, German civil law, and socialist law systems in 30 countries.

Based on the growth data of 'purchasing-power-parity' from 1960 to 2007, Klerman, Mahoney, Spamann, and Weinstein found that colonizer identity is the driving factor in economic growth, rather than legal origins.[409] The coded data was divided into five groups: 'former English colonies, former French colonies, former colonies of French civil law countries other than France (Belgium, Italy, the Netherlands, Portugal, Spain, Ottoman Empire, and pre-communist Russia), other former colonies, and countries never colonized'.[410] They found that former English colonies grew faster than former French colonies. Former French colonies grew slower than 'former colonies of French civil law countries other than France', while the last-mentioned colonies had similar growth rates to former English colonies.[411]

Using time-series data concerning 'procedural complexity, duration, and cost in courts of the first instance' from the World Bank Doing Business Reports from 2003

[405] Legrand (n 279) 441.

[406] John Armour et al, 'Law and Financial Development: What We Are Learning from Time-Series Evidence' (2009) 2009(6) *Brigham Young University Law Review* 1435, 1436, 1438.

[407] Ibid 1500.

[408] Dionysia Katelouzou and Mathias Siems, 'Disappearing Paradigms in Shareholder Protection: Leximetric Evidence for 30 Countries, 1990–2013' (2015) 15(1) *Journal of Corporate Law Studies* 127, 159-60.

[409] Daniel M. Klerman et al, 'Legal Origin or Colonial History?' (2011)(3) *Journal of Legal Analysis* 379, 394-5.

[410] Ibid 386.

[411] Ibid 395, 399.

to 2008[412], Spamann's study comparing civil procedure between common law and civil law countries found there were no systematic differences between the two different legal systems in the 'complexity, formalism, duration, or cost of the procedure in courts'.[413] Common law countries had 'more complex, protracted and costly' procedure than civil law countries, but the difference was not significant.[414] Both legal systems were worse than the German civil law countries and Scandinavian legal system.[415] However, common law countries had a better contract enforceability.[416] This finding challenges those of the proponents of the legal origins hypothesis that civil law countries have more complex and formal civil procedures.[417] In addition, Armour et al.'s longitudinal study of 20 developed and developing nations found that between 1995 and 2005 investor protection was stronger in common law than civil law countries but was decreasing. Nevertheless, they found no significant correlation between the level of shareholder protection and the four indicators of stock market development: market capitalization-to-GDP, the value of stock market trading as a percentage of GDP, turnover ratio of the stock market, and the number of listed firms per millions of people.[418]

Spamann has criticized one of the indictors used by LLSV [419], the 'anti-director rights index' (ADRI) based on six quantitative elements. Three related to shareholder voting: 'voting by mail, voting without blocking of shares and calling an extraordinary meeting' and the others related to minority shareholder protection: 'proportional board representation, pre-emptive rights, and judicial remedies'.[420] His study used corrected coding by substantially modifying the index's components that differ significantly from the LLSV's original coding.[421] He found that in terms of 'legal origins and investor protection', the German legal family had the highest score, followed by Scandinavian countries, common law countries, and civil law countries. However, the

[412] Holger Spamann, 'Legal Origin, Civil Procedure, and the Quality of Contract Enforcement' (2010) 166(1) *Journal of Institutional and Theoretical Economics* 149, 151.
[413] Ibid 155.
[414] Ibid.
[415] Ibid.
[416] Ibid 165.
[417] Ibid 162. See also Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46(2) *Journal of Economic Literature* 285, 286.
[418] John Armour et al, 'Shareholder Protection and stock Market Development: An Empirical Test of the Legal Origins Hypothesis' (2009) 6(2) *Journal of Empirical Legal Studies* 343, 371.
[419] La Porta et al (n 388) 1123.
[420] Holger Spamann, 'The "Antidirector Rights Index" Revisited' (2010) 23(2) *Review of Financial Studies* 467, 468.
[421] Ibid 474-6.

difference between the last two countries was not significant.[422] This finding disproves the LLSV's results using the original ADRI, which maintains that common law countries have better investor protection compared to German, French, or Scandinavian civil law legal systems.[423] Moreover, based on the corrected ADRI, there was no strong correlation between investor protection and dispersion of share ownership or a bigger equity market, as claimed by the original ADRI.[424]

Rajan and Zingales's study reveals that in 1913 stock market capitalization as a ratio of GDP in France was almost double that of U.S. (0.79 vs. 0.46), even though in 1999 the U.S. capital market capitalization was bigger than France (1.52 vs. 1.17). However, the legal system in France and the U.S. did not change between 1913 and 1990.[425] This finding raises questions about the LLSV's claim that there is a correlation between legal origins and a country's financial development.[426] Instead, Rajan and Zingales argue that the elements which contribute to financial development are:[427]

> (1) respect for property rights, (2) an accounting and disclosure system that promotes transparency, (3) a legal system that enforces arm's length contracts cheaply, and (4) a regulatory infrastructure that protects consumers, promotes competition, and controls egregious risk-taking.

Musacchio's case study tests the correlation between legal origin and bond market development in Brazil. It challenges the assumption that Brazil, as a French civil law country, has a profile of weak creditor protection; as a consequence, the bond market would have suffered.[428] He found no strong relationship between creditor protection and the development of the bond market in Brazil.[429] The country's bond market variation was more affected by macroeconomic stability and 'international capital flows'.[430]

Responding to Rajan and Zingales, La Porta, Lopez-de-Silanes, and Shleifer (LLS) argue that the authors did not exclude the bond market from the stock market in their calculation. Consequently, this can produce inaccurate data since stock market

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[422] Ibid 477.
[423] Ibid.
[424] Ibid 483.
[425] Raghuram G. Rajan and Luigi Zingales, 'The Great Reversals: the Politics of Financial Development in the Twentieth Century' (2003) 69(1) *Journal of Financial Economics* 5, 7.
[426] Ibid 42.
[427] Ibid 18.
[428] Aldo Musacchio, 'Can Civil Law Countries Get Good Institutions? Lessons from the History of Creditor Rights and Bond Markets in Brazil' (2008) 68(1) *The Journal of Economic History* 80, 82.
[429] Ibid 104.
[430] Ibid.

capitalization can better represent the financial development of a country.[431] Taking out the bond market in 1913 from the calculation decreases the ratio of stock market capitalization in French civil law countries to below the average of common law countries because bonds were the most traded securities on stock exchanges at that time.[432]

From the comparative law perspective, Michaels argues that the division of a legal system by legal origin theory into common and civil law is crude.[433] Now most legal systems influence each other. Continental legal thought has influenced English and the US common law. Likewise, common law thinking has influenced the civil law system.[434] Therefore, the division of the legal systems is considered irrelevant.[435] Legal origin literature also tends to view a country's legal system as static, whereas comparative lawyers see legal systems as dynamic and responding differently to 'the common development'.[436] Legal origins, however, still have value because they can bring a fresh and different perspective, especially in motivating policymakers to initiate law reforms.[437] However, law reform should focus on the local situation and local fit rather than on finding the best legal system, exporting it, and using a 'one size fits all approach'.[438]

Reitz argues that despite many criticisms of legal origins there are positive aspects of legal origins scholarship from the perspective of comparative law.[439] First, the use of quantitative methods in legal origins is an extension of comparative law, not a substitute. Hence, the partnership between legal origins and comparative law can offer potential benefits.[440] Second, comparative law scholars should be wary of the disciplinary bias in legal origins and explore the use of the quantitative method as a tool to generalize legal systems.[441] Third, the conclusion made by legal origins especially about the more 'intrusive or regulatory conception of the state' in civil law systems compared with

[431] La Porta, Lopez-de-Silanes and Shleifer (n 417) 317.
[432] Ibid.
[433] Ralf Michaels, 'Comparative Law by Numbers - Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law' (2009) 57(4) *American Journal of Comparative Law* 765, 780.
[434] Ibid.
[435] Ibid 781.
[436] Ibid 782.
[437] Ibid 788.
[438] Ibid.
[439] John Reitz, 'Legal Origins, Comparative Law, and Political Economy' (2009) 57(4) *American Journal of Comparative Law* 847, 848.
[440] Ibid 849.
[441] Ibid 851.

common law systems should facilitate 'understanding across legal systems', but not be used as 'a blueprint for legal reforms'.[442] Reitz explains that using proxies to simplify the process of collecting data and measurement in the quantitative methods of legal origins may result in inaccuracy and error that can 'invalidate the project'.[443]

After examining the positive and negative aspects of the quantitative approach of legal origin, Siems had mixed conclusions.[444] He explained that while 'numerical comparative law' can potentially increase comparative law applicability, it can produce misleading or limited results. He suggested that comparative study should include legal effectiveness and functional equivalents to prevent home bias and hidden benchmarking where a researcher is more familiar with a particular legal system.[445]

Roe argues that proponents of legal origins who maintain that the civil law system overregulates and common law underregulates financial markets are not based on recent development [446] and the difference between the two systems has diminished.[447] Firstly, both legal systems have been influenced by the development of the regulatory state.[448] Secondly, some characteristics of the common law system have been adopted by some civil law countries; judges in France, for example, have used precedents comparable with the common law model. Lastly, most common law countries have codified financial law and use regulation more extensively.[449] Legislature in common law countries gives the administrative agency the power to write regulations to implement general rules in legislation, causing a decline in the role of the court. The remaining difference between the common and civil law systems is the court procedure which, according to Roe, does not significantly affect finance.[450]

Therefore, the legal origin theory is not intended to provide guidance on how to transplant legal institutions or legal regulations from common law countries and other types of legal systems. However, from the perspective of the policymakers and legal scholars, laws and regulations should be implemented effectively and facilitate business,

[442] Ibid 849, 855.
[443] Ibid 851-2.
[444] Mathias M. Siems, 'Numerical Comparative Law: Do We Need Statistical Evidence in Law in Order to Reduce Complexity' (2005) 13 *Cardozo Journal of International and Comparative Law* 521, 538.
[445] Ibid 540.
[446] Roe (n 324) 473.
[447] Ibid 475.
[448] Ibid 476.
[449] Ibid 478.
[450] Ibid 479.

as suggested by Siems.[451] The theory also reminds us that a law should not be seen as the objective and serving its own purpose. The critique of the theory about the lengthy process and cost of court procedures, for example, has reminded legislative drafters to consider other relevant elements beyond substantive and formal laws that can affect the interplay between the laws and their users such as businesses and investors.[452]

Developing countries need to take into account many aspects of transplanting laws and regulations from foreign countries, especially those with a different legal system. The World Bank report on *Doing Business* has encouraged many developing countries to adopt regulations that have been considered important factors in the economic development of the developed countries.[453] There have been many critiques of the legal origin theory in terms of the use of indicators by LLSV [454], how the study reached its conclusions based on quantitative measurement of the indicators[455], and how the interpretation of results was potentially influenced by home bias[456]. Therefore, this convergence of legal reform in business regulation in many developing counties should also consider that legal transplant also has its own challenges, including the interaction of different factors.[457] It is unwise to undermine the experience of developing countries in adopting foreign laws. Some regulators introduced law reform that were impractical for business and investors.

In addition, the transplantation process needs to fit the national context and local laws. The voluntary efforts to harmonize or modernize national laws are common, especially in commercial relationships, business law, and international trade.[458] International business has been practiced with a common business language, common understandings, and common behaviour[459] as a result of globalization. At the same time, the law moves in conjunction with this development.[460]

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[451] See Siems (n 444) 538.

[452] Spamann (n 412) 155, 162.

[453] Gerard McCormack, 'Why 'Doing Business' with the World Bank May Be Bad for You' (2018) 19(3) *European Business Organization Law Review* 649, 650. See also Marek Hanusch, 'The Doing Business Indicators, Economic Growth and Regulatory Reform' (the World Bank, paper, 2012) 4-5.

[454] See Spamann (n 420) 468-9.

[455] See Klerman et al (n 409) 382-3. See also Armour et al (n 418) 349.

[456] See Siems (n 444) 540.

[457] McCormack (n 453) 671.

[458] Lawrence M. Friedman, 'Borders: On the Emerging Sociology of Transnational Law' (1996) 32(1) *Stanford Journal of International Law* 65, 69.

[459] Ibid.

[460] Ibid 75.

2.12 How to Achieve Success in Legal Transplant and Adaptation with Domestic Institutions

Nelken states that the transplanted law's success is commonly associated with the new legislation fitting the new environment.[461] The criteria may not be the same for a different person; success from one person's viewpoint does not have the same meaning for another.[462] There can be various interests involved in the process of legal transplants, such as governments, private institutions, parliaments, lawyers, other professionals, and businesspeople.[463] The introduction of new criminal law may have favourable implications for politicians, but human rights organizations may view it as a drawback. However, even if one can decide what constitute success, it cannot be assumed that success will be all or nothing, since adaptation may work at one level but may fail at another.[464]

For Legrand, to transplant rules to a new environment is unrealistic because rules carry their own meaning and ideas, which are integrated with the culture of the home country.[465] Transplanting rules to a new host country, may cause the meaning of the rules to stay behind.[466] Consequently, some elements of the rules will diminish, and not be incorporated into the new jurisdiction, 'limiting the possibility of effective legal transplantation'.[467] Similarly, Cotterell argues that in analysing legal transplantation, it is important not only to focus on the legal culture of elite professionals such as lawyers and legal drafters, but also the other social groups, such as the experience of common people and even 'the society as a whole'.[468]

Friedman refutes the notion that law transplantation is only importing 'a dead letter'[469] with evidence it has occurred throughout history. Japan and Turkey successfully transplanted their law from the German civil code.[470] The Japanese adoption of the

[461] Nelken (n 373) 20.

[462] David Nelken, 'The Meaning of Success in Transnational Legal Transfers' (2001) 19 *Windsor Yearbook of Access to Justice* 349-366, 351.

[463] Ibid 363.

[464] Nelken (n 373) 47.

[465] Pierre Legrand, 'What "Legal Transplants"? ' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart, 2001) 55, 61.

[466] Ibid.

[467] Ibid 62.

[468] Roger Cotterell, 'Is There a Logic of Legal Transplants?' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart, 2001) 70, 90.

[469] Lawrence Friedman, 'Some Comments on Cotterel and Legal Transplants' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart, 2001) 93, 94.

[470] Ibid.

Western code coincided with its industrialization and development as a world power.[471] Borrowing Western codes was a shortcut to modernizing the Japanese legal system.[472] Another example is the migration of common law to the US and New Zealand, as the former British settlements, and the former British colonies in Nigeria and Malaysia.[473] However, Friedman believes that the term legal transplant is inappropriate since what really happens is the diffusion of the laws, codes, or rules from the home country to other countries.[474] Legal borrowing is more appropriate because the process of importing laws is mostly voluntary and the countries can establish their own institutions.[475] For example, the US borrowed the idea of an ombudsman from Sweden without conquering the country.[476]

Comparing experiences of legal transplantation in southeast Asian countries such as Indonesia, Malaysia, Singapore, Thailand, Burma, and Vietnam, Harding concluded it had been successful if the measurement is how foreign laws have been incorporated in their legal systems.[477] His study supports Watson's functionalism that 'legal ideas can be transplanted', irrespective of cultural factors. He notes, however, that the transplantation process is not always immune from continuing conflicts between indigenous and imported law.[478] For example, In Indonesia, Dutch law continues to prevail, since the national consensus has seen that *Adat* law and Islamic law cannot facilitate the effort to reach a modern state.[479]

2.13 Research Gap

The long-term implications of equity crowdfunding are still uncertain given that its practice (entrepreneurial activity) and policy (government action) has mostly not been studied and analysed.[480] De Buysere et. al. suggest that establishing the integrity and ethics of crowdfunding in Europe requires three essential pillars: regulation, education,

[471] Ibid 95.
[472] Ibid.
[473] Ibid 94.
[474] Ibid.
[475] Ibid.
[476] Ibid.
[477] Andrew Harding, 'Comparative Law and Legal Transplantation in South East Asia: Making Sense of the "Nomic Din"' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart, 2001) 199, 213.
[478] Ibid 209.
[479] Ibid 312.
[480] Mollick (n 40) 1.

and research.[481] Legislation should aim to signal credibility to funders, and focus on 'financial transparency practice', security of payments, and the functionality of platforms.[482] To regulate equity crowdfunding effectively, it is important to understand the motivation behind it,[483] the risks, the benefits, the characteristics, and the operating environment that could lead to its success.

Information asymmetry is one of the significant issues to be resolved in equity crowdfunding. Many studies have discussed how to reduce information asymmetries such as signalling, social networks, and a short version of disclosure requirements.[484] However, they do not address whether such tools are adequate to allow investors to make a fair and informed investment decisions. This question is important because reasonable disclosure requirements are required for an investor to make an informed decision. Regulation of equity crowdfunding in many advanced countries is designed as an exemption from mainstream or traditional securities regulation. It is viewed as an activity to sell securities to the public, traditionally under the area of securities regulation.

Regulation of equity crowdfunding is difficult and challenging. The potential benefits as well as the associated risks are discussed in the literature. It is argued that 'regulation generally lags far behind experimentation'.[485] There is no single approach to the regulatory regime of equity crowdfunding and there has not yet been harmonisation of the regulation cross-jurisdictionally.[486] Careful analysis, on a case by case basis, is therefore required to align the development of the market and the regulatory incentives

[481] Buysere et al (n 45) 5.

[482] Ibid.

[483] Marina Nehme, 'Regulating Crowd Equity Funding – the Why and the How' (2018) 45(1) *Journal of Law and Society* 116, 118.

[484] See, eg, Ahlers et al (n 76) 957; M. Hechavarría Diana, H. Matthews Charles and D. Reynolds Paul, 'Does start-up financing influence start-up speed? Evidence from the panel study of entrepreneurial dynamics' (2016)(1) *Small Business Economics* 137, 161; Stanislav Mamonov, Ross Malaga and Janet Rosenblum, 'An Exploratory Analysis of Title II Equity Crowdfunding Success' (2017) 19(3) *Venture Capital* 239, 253; Polzin Friedemann, Toxopeus Helen and Stam Erik, 'The wisdom of the crowd in funding: information heterogeneity and social networks of crowdfunders' (2018)(2) *Small Business Economics* 251, 261-2; Evila Piva and Cristina Rossi-Lamastra, 'Human Capital Signals and Entrepreneurs' Success in Equity Crowdfunding' (2018) 51(3) *Small Business Economics* 667, 681; Thang Nguyen, Joe Cox and Judy Rich, 'Invest or Regret? An Empirical Investigation into Funding Dynamics During the Final Days of Equity Crowdfunding Campaigns' (2019) 58 *Journal of Corporate Finance* 784, 798.

[485] Joseph J. Dehner and Jin Kong, 'Equity-Based Crowdfunding outside the USA' (2014) 83 *University of Cincinnati Law Review* 413, 413.

[486] Kirby and Worner (n 139) 10.

to support it.[487] Groshoff contends that equity crowdfunding is a useful technique for economic development.[488]

Changes to relevant national laws and regulations may be needed to establish a credible system of equity crowdfunding. Legal issues have been identified as restricting its development in many countries.[489] The challenge of deploying the internet to raise funds from the public is a regulatory rather than technology issue.[490] According to a World Bank report, a critical factor in good crowdfunding systems is 'forward-thinking regulations'.[491] Therefore countries should address their current regulation, as it is potentially burdensome for a business to operate crowdfunding.[492] Cyper and Dietz argue that the economic development of a country is significantly influenced by how it removes barriers to economic growth and transformation.[493] They state that:[494]

> The challenge for the development analyst is thus to attempt to identify the most significant barriers to development in each country and to formulate effective measures, including public policy, that can begin to undo, remove, or at least minimize the effects of these obstacles to progress that slow or thwart the development process.

This study aims to filling the gap in the literature by analysing regulation that accommodates the interests of equity crowdfunding stakeholders based on information asymmetry theory, agency theory, and stages of funding theory. Studies from other countries could also address issues such as information asymmetry.[495] However, it should be noted that transplanting a system of laws or regulations from other jurisdictions should be based on careful analysis. Adaptation to local traditions is vital to ensure legal transplants will work.[496] A comprehensive adjustment is required to merge the

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[487] Dehner and Kong (n 485) 440.

[488] David Groshoff, 'Equity Crowdfunding as Economic Development' (2016) 38 *Campbell Law Review* 317, 328.

[489] Vismara (n 114) 579.

[490] Edmund W. Kitch, 'Crowdfunding and an Innovator's Access to Capital' (2013) 21 *George Mason Law Review* 887, 887.

[491] Information for Development Program (infoDev); The World Bank, *Crowdfunding's Potential for the Developing World* (Washington DC, World Bank, 2013) 27 <https://www.infodev.org/sites/default/files/infodev_crowdfunding_study_0.pdf>.

[492] Ibid 10.

[493] James M. Cypher and James L. Dietz, *The Process of Economic Development* (London; New York: Routledge, 2009, 3rd ed, 2009) 22.

[494] Ibid.

[495] Gmeleen Faye B. Tomboc, 'The Lemons Problem in Crowdfunding' (2013) 30 *John Marshall Journal of Information Technology and Privacy Law* 253, 266.

[496] Mark Van Hoecke, 'Legal Culture and Legal Transplants' in Richard Nobles and David Schiff (eds), *Law, Society and Community* (Ashgate Publishing, 2014) 273, 274.

transplanted regulation in a different legal environment.[497] Kanda and Milhaupt posit that legal transplants will not succeed if relevant actors ignore the imported laws or regulations or 'lead to unintended consequences'.[498]

[497] Jorg Fedtke, 'Constitutional Transplants: Returning to the Garden' (2008) 61(1) *Current Legal Problems* 49, 51.

[498] Hideki Kanda and Curtis J. Milhaupt, 'Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law' (2003)(4) *The American Journal of Comparative Law* 887, 890.

Chapter 3 : Context of the Study

3.1 A Brief Description of the Indonesian Legal System

Sources of law in common and civil law countries differ. Cruz explains that the formal sources of law in common law countries are 'legislation, codes, judicial decisions, custom, doctrinal or scholarly writing and equity', while in civil law countries they 'are the codes, enacted law, doctrinal writing, custom and decided cases'.[499] Several elements of civil law countries, according to Cruz, are:[500]

> … their sources of law (predominantly codes, statutes, and legislation), their characteristic mode of thought in legal matters, their distinctive legal institutions (and judicial, executive and legislative structures) and their fundamental legal ideology. All these elements determine their unique 'juristic style'….

Indonesia has the characteristics of civil law countries as some of its sources of law such as civil code, commercial code, and criminal code which have existed since Dutch colonialism have been codified.[501] Its legal system is civil law derived from Western European countries and originating from the *Roman jus civile*.[502] The Dutch legal system still exists, based on Section II of the transition provision of UUD 1945 which mentions that all laws prevail, as long as it does not contradict the constitution (UUD 1945), and there have been no new laws to replace existing laws.[503]

It should be noted that as well as civil law, *Adat* law is still applicable for many *adat* communities[504], while Islamic law is applicable for business transactions based on sharia law, as well as the 'system of inheritance law' and marriage law for most

[499] De Cruz (n 403) 29.

[500] Ibid 45-6.

[501] Tim Lindsey, 'When Words Fail, Syariah Law in Indonesia: Revival, Reform or Transplantation?' in Penelope Nicholson and Sarah Biddulph (eds), *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Martinus Nijhoff Publishers, 2008) 195, 196.

[502] De Cruz (n 403) 45.

[503] See Indonesia, Undang-*undang Dasar 1945 (UUD 1945) dan perubahannya [the Constitution of 1945 and its amandments]* (Indonesia), art II of the transition provision.

[504] Mutaqin discusses the history of *Adat* law and explains that Dutch colonizers in Indonesia preferred to maintain Adat law for indigenous people. Attempts at unification of the civil law based on the Dutch civil code were rejected by many Dutch legal scholars for social, cultural and political reasons. See Zezen. Z. Mutaqin, 'Indonesian Customary Law and European Colonialism: A Comparative Analysis on Adat Law' (2011) 4(2) *Journal of East Asia and International Law* 351, 373-4. See also Daniel S. Lev, 'Judicial Unification in Post-Colonial Indonesia' (1973)(16) *Indonesia* 1, 22-3, who explain that judicial unification has been a continuous issue before and after colonization in Indonesia for political and social reasons.

Muslims in Indonesia.[505] Although post-independence national laws and the prevailing codes and laws from the Dutch colonial era are the dominant legal order, these have to co-exist with *Adat* law and Islamic law. Salim therefore correctly states that Indonesia has legal pluralism since two or more laws co-exist within the processes of modernisation programs in nation-states.[506]

There had been contested scholarly and political debate about Dutch law in Indonesia as a newly independent country that wanted to have its own national legal system. Hollemand observes that after Indonesian independence, Dutch legal codes continued to apply to Indonesian people 'to whom it was declared applicable in the past or who voluntarily submitted themselves (and their descendants) to it as a whole or in part'.[507] However, this view based on the division of people during Dutch colonization into Europeans, Oriental or East Asians, and indigenous people, is now considered outdated.[508] The Dutch civil code was applied to Europeans and other non-Europeans who voluntarily submitted themselves to it.[509] In the early years of Indonesian independence, there were arguments that the national law should be based on *Adat* law that originally comes from the Indonesian people[510] and should become part of national law.[511]

However, the Indonesian courts have played a crucial role in determining which law applies in many cases and continue to have a strong influence on the implementation of the legal system, especially when choosing which law is applicable in a case that involves conflicting application of different legal systems. Indonesian judges must state the reasons for their judgment and the laws used. At the same time, they also

[505] For the discussion concerning the difference of systems of inheritance based on *Adat* law, Islamic law and the Indonesian civil code, see Yeni Salma Barlinti, 'Inheritance Legal System in Indonesia: A Legal Justice for People' (2013) 3 *Indonesia Law Review* 23.

[506] Arskal Salim, 'Dynamic Legal Pluralism in Indonesia: Contested Legal Orders in Contemporary Aceh Part 1' (2010) 61 *Journal of Legal Pluralism and Unofficial Law* 1, 5.

[507] H.W.J. Sonius, 'Introduction' in J. F. Holleman (ed), *Van Vollenhoven on Indonesian Adat law* (Springer Netherlands, 1981) XXIX, LIX.

[508] Teuku Muttaqin Mansur, *Hukum Adat: Perkembangan dan Pembaruannya [Adat law: The Development and Its Renewal]* (Syiah Kuala University Press, 2018) 213.

[509] Ibid 31, 48. See also Sonius (n 507) LIX.

[510] Soetandyo Wignjosoebroto, *Dari Hukum Kolonial Ke Hukum Nasional [From Colonial Law to National Law]* (RajaGrafindo Perkasa, 1994) 240.

[511] Satjipto Rahardjo, '*Hukum Adat Dalam Negara Kesatuan Republik Indonesia [Adat law in the Republic of Indonesia]'* in Komisi Nasional Ham Asasi Manusia Indonesia [Indonesian Human Rights Commission] (ed), *Inventarisasi dan Perlindungan Hak Masyarakat Hukum Adat* [Inventarisation and the Protection of *Adat* Rights] (Komisi Nasional Ham Asasi Manusia Indonesia, 2005) 1, 47. See also Daniel S. Lev, 'Colonial Law and the Genesis of the Indonesian State' (Pt Cornell Southeast Asia Program) (1985)(40) *Indonesia* 57, 58. Lev discusses the evolution of the Indonesian (Dutch Indie) legal system during the Dutch colonialism and after the Indonesian independence.

have to consider the legal value and the sense of justice derived from the unwritten laws in society.[512] It is difficult to determine if the national law will prevail over *Adat* law where there are differences between the legal systems. Most legal scholars examine each issue differently, especially where the *Adat* law still has a strong social influence, such as for marriage, inheritance, and land status.[513] Nevertheless, in almost all private law areas in modern businesses and economic transactions, national laws are applied.[514]

Legal institutions in Indonesia mainly use codes, statutes, and legislation as the sources of law. According to the law relating to the drafting of legislation, the hierarchy of laws and regulations [*peraturan perundang-undangan*] is the UUD 1945 and its amendments (the constitution), the decision of the People's Consultative Assembly, statutes (the term statutes and laws are used interchangeably in this thesis), government regulations which replace statutes (the term Interim Emergency Law is used for simplicity), government regulations, presidential regulations, and other operational regulations such as ministry regulations, Central Bank regulations, and the Financial Services Authority regulations.[515]

The other sources of law recognized by legal scholars, legal professions and judges in Indonesia are international agreements, customs (*kebiasaan*), opinion of experts (*doktrin*), and prominent decisions of the Supreme Court (*yurisprudensi*).[516] Usually, the courts and legal profession do not use foreign laws in court litigation. This is also the French case law position that does not refer to foreign law in deciding cases. In contrast, in Germany, the highest court occasionally uses foreign law to support its decisions, usually from countries with a similar legal system such as Austria and Switzerland, and

[512] See *Undang-undang No. 48 Tahun 2009 tentang Kekuasaan Kehakiman [Indonesia Law No 48 of 2009 on Judicial Power]* (Indonesia) articles 5, 50.

[513] For example, see Abdurrahman, '*Beberapa Catatan Mengenai Kedudukan Hukum Adat Dalam Undang-Undang Perkawinan* [Some Notes about the Position Adat Law within the Marriage Law]' (1983) *Hukum dan Pembangunan*; M Sulastriyono and S. D. F. Aristya, '*Penerapan Norma Dan Asas-Asas Hukum Adat Dalam Praktik Peradilan Perdata* [The Implementation of Norms and Principles of Adat law in the Civil Court Proceeding]' (2012) *Mimbar Hukum* 25; and Yusuf Salamat, '*Pengaturan Mengenai Hak Atas Tanah Masyarakat Hukum Adat* [Regulation of the Rights of Land for the Adat Communities]' (2016) 13(4) *Jurnal Legislasi Indonesia* 411.

[514] In practice, *Adat* law has very little imposition on contract law and commercial law. See Mahy (n 345) 399.

[515] *Undang-undang No. 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-undangan, sebagaimana diubah dengan Undang-undang No. 15 Tahun 2019 [Law No. 12 of 2011 on Rules to Make the Laws, as amanded by Law No. 15 of 2019]* (Indonesia) articles 7-8.

[516] See Hanafi Arief, *Pengantar Hukum Indonesia Dalam Tataran Historis, Tata Hukum dan Politik Hukum Nasional [Introduction to the Indonesian Law: History, Legal System and National Legal Politics]* (LKiS Pelangi Aksara, 2016) 43-7; Muhammad Bakri, *Pengantar Hukum Indonesia: Sistem Hukum Indonesia pada Era reformasi, Jilid 1 [Introduction to the Indonesian Law: Indonesian Legal System in the Reformation Era, Book 1]* (Universitas Brawijaya Press, 2nd ed, 2013) 121.

hardly makes any reference to common law countries or French law.[517] However, although Indonesian expert opinion of civil, commercial, and criminal codes has been used as a source of law, opinions of Dutch legal scholars such as Pompe, J.E. Jonkers, and Remmelink still influence interpretation of the codes.[518]

There is no clear guidance on when each of the instruments should be used. Lindsey and Butt remark that '[t]he precise operation of the hierarchy is unclear, disputed, and highly problematic'.[519] Although the law explains briefly the conditions under which the instruments of law should be used, in many instances, there are inconsistencies in their implementation. For example, if the Government issues Interim Emergency Law[520], there should be an emergency situation *[hal ikhwal kegentingan yang memaksa]*. But there is no clear guidance for the term, which leads to multiple interpretations. Some scholars argue that the content of an Interim Emergency Law is an administrative matter for the Government, but not the power and authority of state institutions such as the parliament and the judiciary.[521]

The Constitutional Court of Indonesia has explained in several decisions that various criteria can be used to interpret the emergency situation and to issue an Interim Emergency Law. In a 2009 decision it ruled that there were three requirements to satisfy the definition of an emergency situation when issuing an Interim Emergency Law.[522] First, it should need an urgent legal solution based on the law. Second, there has been no law that regulates the situation, or current laws have not addressed the situation adequately. Third, it cannot be addressed by normal legal procedures and there is an urgent need to solve the emergency situation. Nevertheless, this decision is not considered to be comprehensive. After the decision, there were several other Constitutional Court

[517] Jan M Smits, 'Comparative Law and its Influence on National Legal Systems' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2nd ed, 2019) 502, 509.

[518] See Agus Rusianto, *Tindak Pidana dan Pertanggungjawaban Pidana: Tinjauan Kritis Melalui Konsistensi antara Asas, Toeri, dan Penerapannya [Criminal Acts and Criminal Liablities: Critical Evaluation based on the Principles, Theories, and Implementation]* (Kencana, 1st ed, 2016) 65, 111, 114.

[519] Lindsey and Butt (n 326) 37.

[520] Interim emergency law can be issued unilaterally by the Government; however, it must be approved by the first parliament (DPR) session after the date of the enactment. See Ibid 48.

[521] Ali Marwan Hasibuan, '*Kegentingan yang Memaksa dalam Pembentukan Peraturan Pemerintah Pengganti Undang-undang [Compelling Circumstances of the Enactment of Government Regulation in Lieu of Law]*' (2017) 14(1) *Jurnal Legislasi Indonesia* 109, 112.

[522] See *Putusan Mahkamah Konstitusi Republik Indonesia Indonesian No. 138/PUU-VII/2009 tanggal 8 February 2010 [Decision of the Constitutional Court of The Republic of Indonesia No. 138/PUU-VII/2009 date 8 February 2010]* (Indonesia). See also Lindsey and Butt (n 326) 49.

cases that were based on the allegation similar to the court decision that the Indonesian Government had not been fulfilling the requirements.[523]

3.2 New Features of the Indonesian Legal System

Indonesian law has been directed in its own rather than strictly following the civil law system. Although code law inherited from the Dutch, such as the commercial code, civil code, and criminal code, is still functioning, the approach after Indonesian independence was not to directly amend or change the code but to promulgate new national laws such as the Capital Market Law[524], the Insurance Law[525], the Banking Law[526], and the Consumer Protection Law[527]. This is considered more practical in accommodating development in many areas of the laws.[528] For example, *the Insurance Law of 1992* (as has been amended in 2014) and *the Capital Market Law of 1995* are new separate laws that amend several articles in the commercial code. This approach is considered more effective, as attempts to revise the Dutch criminal code and civil code to maintain codification in criminal and civil law since the 1970s has not been successful. Instead of strictly following the civil law system, Indonesia has adopted many laws that originated in common law countries; for example, the adoption of a citizen lawsuit, which originated in England and other common law countries such as the US, Australia, Malaysia, and India that have followed this model.[529]

The development of law in the post-colonization period in Indonesia has affected law codes because legal principles such as *lex posterior derogate legi priori* are still applicable. Thus, any new promulgation of laws will amend the criminal or civil code. Also, the application of the legal principle of *lex specialis derogat legi generali*, meaning that when a more generalist law has its own rules, will only be applied if they do not contradict the more specialist law. Nevertheless, the general principles, legal

[523] Hasibuan (n 521) 115-9.

[524] *Law No. 8 of 1995 on Capital Market Law* (Indonesia) (n 20).

[525] *Undang-undang No. 40 Tahun 2014 tentang Perasuransian [Law No. 40 of 2014 on Insurance]* (Indonesia).

[526] *Undang-Undang No. 7 Tahun 1992 tentang Perbankan sebagaimana diubah dengan Undang-Undang No. 10 Tahun 1998 [Law No. 7 of 1992 on Banking as amended by Law No. 10 year 1998]* (Indonesia).

[527] *Undang-undang No. 8 Tahun 1999 tentang Perlindungan Konsumen [Law No. 8 Year 1999 on Consumer Protection]* (Indonesia).

[528] Badan Pembinaan Hukum Nasional [National Legal Development Agency] (Indonesia), '*Analisa dan Evaluasi Peraturan Perundang-undangan Peninggalan Kolonial Belanda [Analysis and Evaluation of the Legal Rules from the Dutch Colonization]'* (Ministry of Law and Human Rights, Report, 2015) 107-8.

[529] Sundari (n 340) 324.

norms, and most articles in Dutch codes are still applicable to many transactions and civil liabilities[530] as Nichols emphasises:[531]

> … While most of the European colonies nominally accepted the common law or code law, in reality, common law and code law took shallow root and at most coexist with traditional law. In many cases, traditional law reasserted itself in the form of authoritarian or mercantilist governments. Traditional law, therefore, should be considered a powerful, if not dominant, influence on the legal systems of Africa, Asia, and South America.

This development affirms Bedner's claim that after independence, the proponents of legal pluralism in Indonesia who were motivated to maintain indigenous legal norms replaced colonial laws, even though they did not always succeed.[532] He also claims that legal co-operation between Indonesia and other developed countries such as the US, Australia, and the Netherlands, as well as Indonesian students returning home after studying foreign laws in these countries, has led to the development of law in Indonesia which is common with legal transplants.[533]

Since 1980s, the Indonesian government has introduced new laws or amended existing ones, many of which were based on common law. Most laws in the banking and financial sectors, as well as company law, are highly influenced by the US law model. Lindsey categorizes Indonesia as having a hybrid legal system.[534] In one hand, most contract law[535], commercial codes, criminal codes, administrative law and judicial procedures[536] are still based on civil law, so the enforcement of all laws still uses this system. On the other hand, many new laws are derived from common law which affects the effectiveness of the courts' decisions, especially when applying transplanted common law legal concepts such as class action, not originally recognized in civil law.

Bedner explains that even with the modern development in politics, economics, social, and other sectors, law in Indonesia is still paralysed by corruption and

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[530] See Lindsey and Butt (n 326) 307.

[531] Nichols (n 304) 272.

[532] Bedner (n 323) 255.

[533] Ibid.

[534] Tim Lindsey, 'Legal Infrastructure and Governance Reform in Post-crisis Asia: The Case of Indonesia' in Tim Lindsey (ed), *Law Reform in Developing and Transitional States* (Routledge, 2007) 3, 28.

[535] Hartono explains that although Dutch commercial code is still applied in Indonesia, many of the articles in the code have been partially amended by new laws influenced by foreign elements, causing the application of the code to be no longer in its original content and interpretation. See Sunaryati Hartono, 'The Law of Contract in Indonesia' (1978) 20(1) *Malaya Law Review* 142, 142-3.

[536] The amendment of the Indonesian Criminal Procedure Code has been influenced not only from the Dutch model but also the US and French models. See Robert R. Strang, 'More Adversarial, but Not Completely Adversarial: Reformasi of the Indonesian Criminal Procedure Code' (2008) 32(1) *Fordham International Law Journal* 188, 194-5.

ineffective operation of legal agencies.[537] Bedner's observations more than a decade ago about the legal system in Indonesia are still relevant, because the court system has not significantly changed. Information concerning legal sources such as parliamentary acts, government regulations, and ministerial regulations has not been well organized and always updated. In particular, lawyers still have difficulty accessing court decisions, although modernising of the court system has improved its administration.

Compared with legal information systems in developed countries, Indonesia is considered to be still developing a well-organized legal information system.[538] As an illustration, although the Supreme Court has made its information system accessible to the public, not all court decisions are available and updated.[539] The challenge is to maintain timely and up to date legal information. Some reformers are alarmed that the Supreme Court has been selective in making court decisions available online, especially controversial decisions.[540] In addition, most transcripts of decisions have not been available immediately after the decision,[541] causing uncertainty for interested parties who need to access them.

3.3 The Concept of Regulation in Indonesia

As explained above, there is a hierarchy of laws and regulations *[peraturan perundang-undangan]* in Indonesia. There are significant differences between the meaning and instrument of regulation in most common law countries and regulation in Indonesia. In common law countries, regulation has been developed from hard law to many instruments of soft law such as self-regulation and co-regulation, while regulation in Indonesia mostly still uses command and control. The effect is that when the Government or an authority intends to regulate a new area, the final result will be a hard law or regulation with administrative or criminal sanction which can only be stipulated by a statute *[undang-undang]* or local government regulation [*peraturan pemerintah daerah]*. The laws and regulations in Indonesia *[peraturan perundang-undangan]* are equal to the concept of legal rules in common law countries, since legal rules bind the public, are backed by sanctions and enforced with command and control regulation.[542]

[537] Bedner (n 323) 256.
[538] Ibid.
[539] See *Direktori Putusan Mahkamah Agung RI [Directory of the Indonesian Supreme Court Decisions]* (Indonesia) <https://putusan3.mahkamahagung.go.id/>.
[540] Lindsey and Butt (n 326) 76.
[541] Ibid 76.
[542] Freiberg and Banks (n 193) 207.

In addition, the Capital Market Law has introduced self-regulation and acknowledges that the stock exchange, central securities depositories, and clearing guarantee institutions are self-regulatory organizations.[543] The Stock Exchange has the power to create binding rules on its members that are not part of laws and regulations *[peraturan perundang-undangan]*. Therefore, although it can issue sanctions on its members, the effect is only a private relationship, not an execution of a public administrative authority. It should be noted that although self-regulation has been introduced in the Capital Market Law, it does not mean that the notion of self-regulation is common as one of the regulatory instruments in Indonesia. It is safe to say that the notion of self-regulation is only narrowly adopted in the law to provide necessary power for the Indonesian Stock Exchange to regulate its member. To date, the definition of soft law in the Indonesian scholarly context is hardly available.

[543] See *Law No. 8 of 1995 on Capital Market Law* (Indonesia) (n 20). The explanation of the article 9 clearly states that a Securities Exchange has the self-regulatory power. The rules of an Exchange bind members and issuers who are listed on the stock exchange.

Chapter 4 : Conceptual Framework

This chapter explains the development of the conceptual framework based on several theories that relevant in regulating equity crowdfunding in developed countries. Developing countries can learn from developed countries about how these theories and concepts concerning the practice and regulation of equity crowdfunding evolved.

4.1 Theoretical Framework

4.1.1 Agency theory

Jensen and Meckling explain that an agency relationship is a contract between two parties, one the principal and the other the agent. The agent acts on behalf of the principal under a delegation of decision-making authority from the principal.[544] An agency relationship is a common means of social interaction and can be found in many contractual arrangements, such as employer and employee.[545]

If the principal and the agent are both 'utility maximizers', Jensen and Meckling argue that there is a considerable ground to believe that 'the agent will not always act in the best interests of the principal'.[546] The mechanism to limit the agent's divergent interests and maximize the principal's welfare is employing monitoring and bonding costs. They use the term 'agency cost' as the aggregate of: 'the monitoring expenditures by the principal', 'the bonding expenditures by the agent', and 'the residual loss'.[547]

The 'Agency Problem' concerns the relationship between the shareholders and managers of a company, board relationships, and 'ownership and financing structures'.[548] Eisenhardt explains that agency theory seeks to resolve the agency problem and the problem of risk sharing.[549] The agency problem occurs because of conflict of goals or interest between the principal and the agent, and verification of real or actual agency activities being costly and difficult. The problem of risk-sharing arises from

[544] Michael C. Jensen and William H. Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3(4) *Journal of Financial Economics* 305, 308.

[545] Stephen A. Ross, 'The Economic Theory of Agency: The Principal's Problem' (1973)(2) *The American Economic Review* 134, 134.

[546] Jensen and Meckling (n 544) 308.

[547] Ibid.

[548] Ibid 309.

[549] Kathleen M. Eisenhardt, 'Agency Theory: An Assessment and Review' (1989) 14(1) *Academy of Management Review* 57, 58.

different risk preferences and consequently 'attitude toward risk' between the two parties is invariably different. Hence the action taken by the agent may be different from the principal. Eisenhardt argues that the focus of agency theory is an efficient contract that governs the relationship between the two parties.[550] Two different approaches to the contract in this regard are the 'behaviour oriented contract', including elements such as salaries and hierarchical structure in an organization, and the 'outcome-oriented contract, including features such as commission and stock option plans.[551]

Eisenhardt argues that the contribution of agency theory in terms of risk, the uncertainty of outcome, and the information system is important to organizational thinking from the perspective of organisational theory.[552] Agency theory re-emphasizes the importance of self-serving interests and incentives to limit them, and the role of information as a commodity and cost.[553] The theory also emphasizes the implications of risk in an uncertain future of organization which may influence the prosperity, outcome achievement, or even bankruptcy of the organizations.[554]

Jensen notes that the literature on agency theory has developed in two streams, namely 'positive theory of agency' and the principal-agent literature. Both address similar problems: firstly, the contract because of different self-interest between the principal and the agent, and secondly, the agency cost to minimize this problem. However, the literature differs on this issue. He explains that the 'positive theory of agency' is largely 'non-empirical oriented' and uses mathematical modelling, while the other literature is mostly empirical and non-mathematical. The positivist literature concentrates on the environment which monitors and limits the self-interest of agents and developing governance because the principal-agent relationship has conflicting interests.[555] The principal-agent literature focuses on developing an optimum contract which influences agent behaviour and the outcome.[556] Eisenhardt notes that in a principal-agent relationship, moral hazard occurs when the agent does not really put effort into what has

[550] Ibid.
[551] Ibid.
[552] Ibid.
[553] Ibid 64.
[554] Ibid 65.
[555] Ibid 59.
[556] Ibid 60.

been agreed.[557] Adverse selection occurs if the agent misrepresents his own skills or abilities when hired.[558]

Agency theory is relevant to the relationship between the entrepreneur and investor, but the theory's implementation should consider the social and economic condition of people and businesses. It can be applied where on the one hand 'a risk-averse entrepreneur' wants to sell part of his shares and, on the other hand, the investors are concern with moral hazard.[559] Bitler, Moskowitz, and Jorgensen state that consideration of the role of agency theory helps to explain why entrepreneurs prefer to hold a large ownership of shares in a company.[560] Bendickson et al. explain that agency theory can be applied where family businesses prefer to retain control of equity ownership. Still, the emphasis should not only be 'self-interest and economic opportunism', but also consider the social realities or the context of the theory.[561] Agency theory should also consider the social aspects which relate to the family business, such as maintaining family harmony rather than simply economic gain, which might lead to suboptimal business performance.[562]

Agency theory has been one of the most important considerations in designing a regulatory framework for start-ups funding. Schwartz argues that the following three crucial problems must be resolved for start-up finance: (1) uncertainty, because the performance of start-ups is difficult to predict; (2) information asymmetry, because entrepreneurs have better knowledge about their companies than common investors; and (3) agency cost, because entrepreneurs tend to adopt self-dealing practices.[563] As an alternative financing source for start-ups, crowdfunding shares the same problems.[564] Regarding agency costs, Schwartz argues that a 'digital monitoring mechanism' is an effective and low-cost solution to this problem.[565] He explains that VCs and angel investors have used conventional techniques to reduce information asymmetries, such as staged financing, preferred stock, control rights, equity-based compensation, geographic

[557] Ibid 61.
[558] Ibid.
[559] Marianne P. Bitler, Tobias J. Moskowitz and Annette Vissing-Jørgensen, 'Testing Agency Theory with Entrepreneur Effort and Wealth' (2005)(2) *The Journal of Finance* 539, 540.
[560] Ibid 572.
[561] Josh Bendickson et al, 'Agency Theory: the Times, They are A-changin' (2016) 54(1) *Management Decision* 174, 188.
[562] Ibid.
[563] Andrew A. Schwartz, 'The Digital Shareholder' (2015) 100 *Minnesota Law Review* 609, 612-3.
[564] Ibid 613.
[565] Ibid 614.

proximity, technical expertise, active participation, mandatory disclosure, proxy contests, takeovers, derivative actions, equity-based compensation, and activist shareholders.[566] He argues that these techniques are not suitable for equity crowdfunding due to its different characteristics compared with other types of financial sources. Instead, he proposes several mechanisms to tackle the three problems of equity crowdfunding. These are: the wisdom of the crowd, crowdsourced investment analysis, online reputation, securities-based compensation, and digital monitoring.[567] Nevertheless, this argument based on secondary journal sources and legal texts requires more analysis to ascertain whether it will be effective in practice.

4.1.2 Information asymmetry theory

The information asymmetry potential problem presents itself when entrepreneurs have more information than investors about the ventures.[568] Overcoming this problem is critical in increasing the confidence of both entrepreneurs and investors because its existence in a crowdfunding market can lead to the 'lemon problem', where poor quality projects remove good quality projects from the market.[569] According to Akerlof, poor quality goods that enter the market can affect the valuation of all goods and will affect the buyers who use market valuation to judge their potential value.[570] He posits that information asymmetry creates a negative effect on the market, as both the number of good quality products and the market size will decrease. Dishonest sellers who offer bad products (or "lemons") threaten the market's existence and drive out honest sellers.[571]

Information asymmetry typically exists in a financial market where information about financial instruments is distributed asymmetrically between the seller and the buyer.[572] Entrepreneurs usually know much more than investors about their projects, assets, and businesses.[573] Based on 2007-2014 data of 1260 non-financial large public companies across different countries, Ballesteros, Sanchez, and Ferrero found that

[566] Ibid 636.
[567] Ibid 658.
[568] Seth C. Oranburg, 'A Place of Their Own: Crowds in the New Market for Equity Crowdfunding' (2016) 101 *Minnesota Law Review Headnotes* 147, 149.
[569] Tomboc (n 495) 253.
[570] George A. Akerlof, 'The Market for "Lemons": Quality, Uncertainty and The Market Mechanism' (1970) 84(3) *Quarterly Journal of Economics* 488, 488.
[571] Ibid 495.
[572] Bruce C. Greenwald and Joseph E. Stiglitz, 'Asymmetric Information and the New Theory of the Firm: Financial Constraints and Risk Behavior' (1990) 80(2) *The American Economic Review* 160, 160.
[573] Hayne E. Leland and David H. Pyle, 'Informational Asymmetries, Financial Structure, and Financial Intermediation' (1977) 32(2) *The Journal of Finance* 371, 371.

high quality financial disclosure decreases the level of information asymmetry and as a result the cost of capital is reduced.[574] Nevertheless, entrepreneurs could not be expected to disclose their project/firm completely because there might be rewards for exaggerating the project's positive value.[575] On the other hand, investors need the information to assess the quality of the project/firm.[576] However, if information asymmetry exists, where the supply of poor quality projects is relatively larger than good quality ones, financial markets may cease to exist.[577]

Information asymmetry theory has almost always been part of the scholarly discussion about closing the gap in information between the entrepreneurs who need funding and the investors who want to invest safely. Leland and Pyle suggest that there is a potential moral hazard concerning the transfer of information from the entrepreneurs to investors. Hence, 'the action of entrepreneurs' might be able to be observed as a signal of good quality projects that investors can recognised.[578] They argue that entrepreneurs' willingness to invest in their own project 'may serve as a signal' of the quality of the project.[579] Corporate disclosure can have a significant role in determining the cost of capital'[580] increase the firm's credibility, and escalate investors' confidence.[581] A substantial degree of information asymmetry tends to cause investors to demand a higher return and increases capital costs for the corporation.[582] Recent studies have suggested that corporate disclosure can lessen information asymmetry.[583]

4.1.3 Start-up stages of funding

Capizzi and Carluccio divide the SMEs' lifecycle into several stages.[584] The first is the seed stage where the business idea is still an abstract concept which needs to be turned into a commercial project, and the feasibility must first be tested; for example, by using a prototype. The second stage is a start-up, commonly less than a year in

[574] Beatriz Cuadrado-Ballesteros, Isabel-Maria Garcia-Sanchez and Jennifer Martinez Ferrero, 'How are Corporate Disclosures Related to the Cost of Capital? The Fundamental Role of Information Asymmetry' (2016) 54(7) *Management Decision* 1669, 1675.
[575] Leland and Pyle (n 573) 371.
[576] Ibid.
[577] Ibid.
[578] Ibid.
[579] Ibid 384.
[580] Cuadrado-Ballesteros, Garcia-Sanchez and Ferrero (n 574) 1669.
[581] Ibid.
[582] David Easley and Maureen O'hara, 'Information and the Cost of Capital' (2004)(4) *The Journal of Finance* 1553, 1578.
[583] Cuadrado-Ballesteros, Garcia-Sanchez and Ferrero (n 574) 1669.
[584] Capizzi and Carluccio (n 104) 119.

duration, when the idea is converted 'into a proper project or service' but entrepreneurs still have to find interested investors to identify its effective potential commercialisation. Next is the early stage, commonly two to five years from the seed stage, when the project is in its commercial phase, but a stable profit has not been achieved and feedback from customers is sometimes received. Lastly, is the later stage, which adjusts the needs of the market, translates customer feedback into a modified project of service, and achieves sustainable growth and high profit if the firm can use its potential within the relevant limited time.

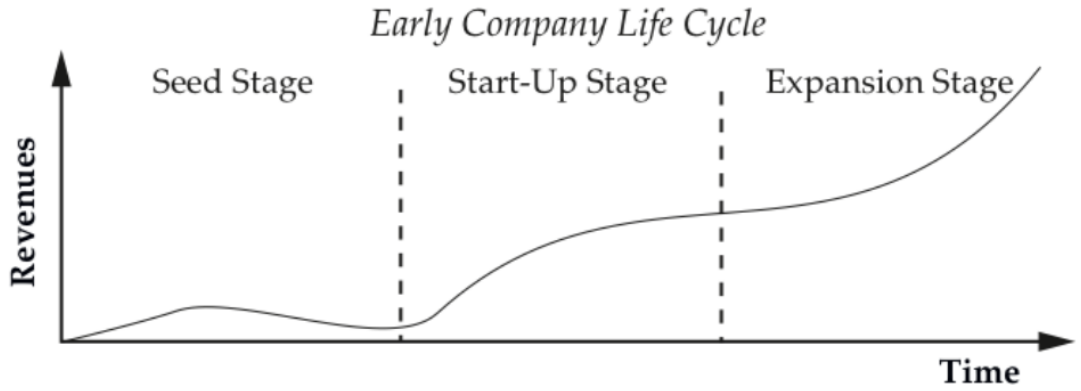

Figure 4.1: Early company lifecycle

(source: Mukherjee, 1992)

It is essential to understand the existence of heterogeneous players in the early-stage financial industry and their specific contributions and resources, including the capital and other kinds of contribution which support the development, growth, and competitiveness of start-ups.[585] Such analysis provides awareness of the options suitable for financial needs, and generates more value for the entrepreneurial firms.[586] From this perspective, crowdfunding platforms are part of a larger system that includes business incubators, accelerators, and science parks, as well as business angels, venture capitals, banks, government, and regulatory authorities, which together support and incentivise start-ups, as well as entrepreneurship.[587]

Capizzi and Carluccio suggest that public policy concerning start-up funding programs should focus on a combination of capital and other non-monetary resources.

[585] Ibid 154.
[586] Ibid.
[587] Ibid.

They explain that an effective selection process and monitoring of who can optimally deploy financial resources, such as those used by venture capitals in allocating funds, is essential so that scarce resources can efficiently serve economic growth and ultimately to advance 'the economic well-being' of society.[588] To support this policy, they argue that the regulator should supervise all players in the 'early-stage financing industry', including 'opaque' participants such as angel investors and their relevant networks. If necessary, this may require obtaining a relevant license, since identification and control of behaviours and competencies of angel investments are necessary to support 'focused and favourable fiscal policies'.[589]

A study based on data from the Business Longitudinal Survey in Australia revealed that the proportion of debt in the capital structure of start-ups correlated positively with their size. The larger the start-ups, the bigger the proportion of debt, the longer the term of the debt, and the higher the amount of loan from banks.[590] In France, manufacturing companies which have existed for less than one year rely largely on trade and bank credit.[591] Banks are more likely to accept loan proposals from larger firms with more assets; whereas small firms with insignificant assets will generally find it hard to obtain loans from banks.[592] It should be noted that the entrepreneur generally chooses debt rather than equity capital to maintain their percentage of share ownership and avoid dilution of control.[593]

The preference of capital structure may not be the same in each country. According to Rocca et. al., information asymmetry affects the preference of SME firms to choose external sources of capital.[594] Their research was based on more than 10,000 SMEs in Italy from 1996 to 2005 and found that although newer companies and start-ups

[588] Ibid 156-7. The term economic well-being can be defined as 'material living conditions' which 'determine people's consumption possibilities and their command over resources'. See The Organization for Economic Co-operation and Development (OECD), *OECD Framework for Statistics on the Distribution of Household Income, Consumption and Wealth* (Paris: OECD Publishing, 2013) 27 <https://www.oecd.org/statistics/framework-for-statistics-on-the-distribution-of-household-income-consumption-and-wealth-9789264194830-en.htm>.

[589] Capizzi and Carluccio (n 104) 156-7.

[590] Gavin Cassar, 'The Financing of Business Start-ups' (2004) 19 *Journal of Business Venturing* 261, 272.

[591] Julia Hirsch and Uwe Walz, 'The Financing Dynamics of Newly Founded Firms' (2019) 100 *Journal of Banking and Finance* 261, 271.

[592] Andy Cosh, Douglas Cumming and Alan Hughes, 'Outside Enterpreneurial Capital' (2009)(540) *The Economic Journal* 1494, 1497, 1530.

[593] Ibid 1528.

[594] Maurizio La Rocca, Tiziana La Rocca and Alfio Cariola, 'Capital Structure Decisions During a Firm's Life Cycle' (2011) 37(1) *Small Business Economics* 107, 127.

faced high costs of debt, the ventures needed the debt as it was essential to support the early stage of the company's growth. The reason was that the insufficient number of internal sources of capital, together with limited resources from the private equity market essentially forced companies to use the banks as their default first choice. The study found that entrepreneurs gradually substituted external debt with internal capital to rebalance the capital structure and consolidate their business.

Berger and Udel[595] similarly note that the choice between equity or debt capital is related to the company's stages of growth. Early-stage companies often require internal finance when the product or the business idea is still being developed, and before they reache a phase where they adopt a business plan in order to market the business and obtain funding from angel investors. Thereafter the company may seek venture capital funding. This may depend, for example, on it having successfully tested the market for the product to ascertain finance relevant to the cost of product development. A study of the use of capital or debt in almost 5,000 US companies by Cotei and Farhat[596] confirmed Berger and Udel's model. They found that the use of external capital was related to information asymmetry during the company's lifecycle. Initially, companies use insider capital. Over time, when the business is less opaque, the use of external financing from debt and equity sources increases substantially and the percentage of ownership of the entrepreneurs decreases. Often entrepreneurs use retained earnings to increase their equity stake in the company. The research also found that companies with high information asymmetry tended to use more equity capital, especially the entrepreneurs' internal capital, and those which had innovative businesses tended to finance them from external equity capital sources.

4.2 Development of the Conceptual Framework

4.2.1 Information asymmetry in crowdfunding

Understanding asymmetrical information in the context of crowdfunding is important for anticipating the negative consequences which result from its growing presence in the market. Its business model suffers from information asymmetry because

[595] Allen N. Berger and Gregory F. Udell, 'The Economics of Small Business Finance: The Roles of Private Equity and Debt Markets in the Financial Growth Cycle' (1998)(6-8) *Journal of Banking & Finance* 613, 623.

[596] Cotei Carmen and Joseph Farhat, 'The Evolution of Financing Structure in U.S. Startups' (2017) 19(1) *The Journal of Entrepreneurial Finance* 1, 13.

of the interaction of two anonymous players.[597] The hidden information problem (adverse selection) and so-called hidden action problem (moral hazard) challenge the model.[598] Investors or pledgers can make an uninformed decision when platforms are unable to provide adequate information and the problem of hidden information remains.[599]

In reward crowdfunding, information asymmetry is present because entrepreneurs introduce new products or services; however, they may only provide 'the description and promise [as to] what the final product will be'.[600] Thus, there is hidden information because they will be in a better position to know what the final product is before investors.[601] But the nature of information asymmetry in reward crowdfunding and equity crowdfunding is different.

In equity crowdfunding, information asymmetry needs to be reduced to overcome the 'lemon problem'[602], so that the relationship of trust between investors and entrepreneurs is preserved, and thus the crowdfunding market can work efficiently. Moritz, Block, and Lutz found that information asymmetries in equity crowdfunding could be reduced by 'personal factors such as sympathy, openness, and trustworthiness'.[603] Their study was based on 23 interviews with twelve investors, six new ventures, and five third parties such as platforms, in Germany.[604] They argued that because of the large group of investors in equity crowdfunding, interpersonal communication is difficult to establish. However, interpersonal communication could be replaced by so-called 'pseudo-personal forms of communication' such as videos or information through social media. Additionally, investors' decision-making is influenced by 'other market participants'.[605] However, third-party endorsements, such as venture capital and business angels, reduce the importance of both pseudo-personal communication and the opinion of peer investors.[606] The significance of this finding is

[597] Abeba Nigussie Turi et al, 'A Co-utility Approach to the Mesh Economy: the Crowd-based Business Model' (2017) 11(2) *Review of Managerial Science* 411, 416.

[598] Pichler and Tezza (n 48) 14.

[599] Ibid.

[600] Belleflamme, Lambert and Schwienbacher (n 37) 597.

[601] Ibid.

[602] Darian M. Ibrahim, 'Equity Crowdfunding: A Market for Lemons' (2015) 100 *Minnesota Law Review* 561, 593.

[603] Alexandra Moritz, Jorn H. Block and Eva Lutz, 'Investor Communication in Equity-based Crowdfunding: a Qualitative-Empirical Study' (2015) 7(3) *Qualitative Research in Financial Markets* 309, 311.

[604] Ibid.

[605] Ibid.

[606] Ibid.

that a combination of investor communication strategies can be used to reduce the 'perceived information asymmetry' and to increase the likelihood of them investing in equity crowdfunding.[607]

Ibrahim proposes to use 'disclosure, the wisdom of the crowd, and the use of reputational intermediaries', although he does not explain in detail what kind of disclosure is needed to inform potential investors. He only refers to a non-specific argument that the disclosure is related to the 'start-ups and the investment under consideration'.[608] In contrast, Griffin argues that although 'the wisdom of the crowd' is a popular theory that may be effective in some internet business models, it will not work in equity crowdfunding.[609] He explains that:[610]

> … crowdfunding supporters rely on three huge assumptions: (1) that someone will uncover fraudulent information in business plans; (2) that the individual will post the "truth" on the Internet; and (3) that crowdfunding investors will see and read the posts about fraudulent business plans before investing. If any one of these assumptions fails, the whole theory collapses. Moreover, the eBay and Amazon "wisdom" will not carry over to crowdfunding, because those systems rely on consumer feedback after a transaction.'" In crowdfunding, after the transaction is too late-the fraudulent actor will have taken the investors' money and run. Submitting negative reviews or ratings about the "entrepreneur" will not be effective because it is doubtful a fraudulent actor will ever post another business plan under the same username.

Beatriz et al. conclude that the cost of a company's capital can be influenced by the dissemination of good quality financial and non-financial information to the market.[611] Easly and O'Hara, on the other hand, suggest that financial analysts can be employed to increase the firm's scrutiny and disseminate the information to increase the quality of information concerning a firm.[612]

While fraudulent fund seekers can use the crowdfunding market to offer products and collects funds in the short term, funders have limited resources such as time and ability to assess the available information to buy the products. They must invest their money without any guarantee that the projects will be profitable and sustainable.[613] Whether a project is honest or fraudulent is a problem that investors need to address.

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[607] Ibid 333.

[608] Ibrahim (n 602) 596.

[609] Zachary J. Griffin, 'Crowdfunding: Fleecing the American Masses' (2012) 4 *Case Western Reserve Journal of Law, Technology and the Internet* 375, 402.

[610] Ibid.

[611] Cuadrado-Ballesteros, Garcia-Sanchez and Ferrero (n 574) 1693.

[612] Easley and O'hara (n 582) 1573.

[613] Tomboc (n 495) 266.

4.2.2 Regulation to address information asymmetry

It has been suggested that the information asymmetry should be reduced in order to increase investor confidence.[614] Many developed countries have started to regulate equity crowdfunding because of the problem of information asymmetry. As explained by Baldwin, one of the reasons to regulate is the inadequacy of information.[615] Investors in the early stage, such as venture capitals and angel investors, spend time and money to do due diligence and monitoring, since they do not have enough information to assess the real value of new ventures.[616] The success of the investment is based on predictive information and a change of business plans is common in new ventures.[617] The distance between the investors and the new ventures influences the effectiveness of due diligence and monitoring.[618] Therefore, venture capitals and angel investors tend to focus on nearby or local start-ups.[619]

During the investment period, most venture capitals and angel investors develop many kinds of strategies to overcome the agency cost and monitoring problem. Gompers explains that 'the use of convertible securities', 'syndication of investment' and 'the staging of capital infusions' are common in most venture capitals.[620] The use of 'the staging of capital infusion' enables venture capitals to periodically collect the information, monitor the progress of the new ventures, and leave the project if it is unsuccessful.[621] Syndication is used to diversify portfolios, incentivize the venture capitals to do due diligence, and increase confidence when investing in new ventures.[622] The other common strategy of the venture capitals is to 'demand a role on the firm's board of directors.[623] Angel investors may use the same strategy as used by the venture capitals since they have the common challenge to overcome information asymmetry.[624] However, the strategy to minimize agency risks during the two types of investors' investment process can also be different. Venture capitals' concern in reducing risks in the pre-

[614] Ibrahim (n 602) 593.
[615] Baldwin, Cave and Lodge (n 191) 1.
[616] Ajay Agrawal, Christian Catalini and Avi Goldfarb, 'Are Syndicates the Killer App of Equity Crowdfunding?' (2016) 58(2) *California Management Review* 111, 111.
[617] Ibid.
[618] Ibid.
[619] Ibid.
[620] Paul A. Gompers, 'Optimal Investment, Monitoring, and the Staging of Venture Capital' (1995) 50(5) *The Journal of Finance* 1461, 1461.
[621] Ibid.
[622] Agrawal, Catalini and Goldfarb (n 616) 112.
[623] Ibid 112.
[624] Ibid.

investment process and following investment procedures is 'a means of signalling competence to their fund providers while angel investors put more emphasis in the post-investment process and involvement in the business of the companies as a method to reduce risks.[625]

However, it should be remembered that the growth of venture capital in developing countries differs to that in most developed countries. In general, the venture capital market in many Asian countries has not been supported by a well-established institutional, legal and regulatory framework, or a 'venture capital culture'.[626] In other Southeast Asian countries (Thailand, Vietnam, and the Philippines), venture capitals is considered immature.[627] Venture capital has not raised and managed significant funds, unlike venture capital in developed countries.[628] Unsupportive institutions[629] have significantly affected the way venture capitalists in these countries operate their businesses. According to Scheela et. al., successful investors have used active networking, close investment-monitoring strategies, extensive due diligence, and a 'hands-on monitoring investment strategy' to effectively adapt to challenging conditions.[630] A hands-on strategy provides more time and support for a venture capital's portfolio company; the venture capitalist is actively involved and helps the portfolio company at the operational level and in taking strategic decisions.[631] In contrast, a hands-off strategy sees venture capital not being involved in the portfolio company, but rather relying on the selection process to carefully choose the portfolio company.[632] Venture capitals can also move from a hands-off to a hands-on approach and be more involved in

[625] Mark Van Osnabrugge, 'A Comparison of Business Angel and Venture Capitalist Investment Procedures: an Agency Theory-based Analysis' (2000) 2(2) *Venture Capital* 91, 108.

[626] Hans Landstrom, 'Pioneers in Venture Capital Research' in Hans Landstrom (ed), *Handbook of Research on Venture Capital* (Edward Elgar, 2007), 14.

[627] William Scheela et al, 'Formal and Informal Venture Capital Investing in Emerging Economies in Southeast Asia' (2015) 32(3) *Asia Pacific Journal of Management* 597, 606.

[628] Ibid.

[629] Institutions in this context refers to the rules for the economic and business activities which include 'formal rules (laws, regulations, professional standards, procedures) and informal constraints (customs, norms, cultures)'. See Michael N. Young et al, 'Strategy in Emerging Economies and the Theory of the Firm' (2014) 31(2) *Asia Pacific Journal of Management* 331, 333.

[630] Scheela et al (n 627) 610.

[631] See Jungwirth Carola and Moog Petra, 'Selection and Support Strategies in Venture Capital Financing: High-Tech or Low-Tech, Hands-off or Hands-on?' (2004)(2-3) *Venture Capital* 105, 123.

[632] Ibid 110.

the portfolio company's management, depending on its expected performance and strategy.[633]

Parsont states that equity crowdfunding, whether offered to retail or accredited investors, can create a 'lemon' problem. The limitation on the amount of investment is too small to motivate them to do due diligence to overcome information asymmetry, causing them to be exposed to a risky investment.[634] In a market where the lemon problem occurs, government intervention might be preferable to protect the welfare of all parties.[635]

Signalling by way of a reputation system, friendship networks, and comments of funders on a discussion board in a funding platform are several tools that may reduce the lemon problem in crowdfunding.[636] Other authors claim that effective signals that can increase funding success are equity retention [637], detailed information concerning risks, internal governance such as high qualification of board members [638], and the use of credible platforms.[639] A crowdfunding platform's collaboration with 'a well-respected third party' such as banks, is also a way of increasing trust from crowdfunding investors since the collaboration is useful in reducing moral hazard.[640] Preliminary evidence shows that lead investors in equity crowdfunding who can overcome information asymmetry problems are effective in increasing retail investors investment in equity crowdfunding.[641]

So far, there is no single approach to regulating crowdfunding and how it should be implemented or merged with existing laws and regulations.[642] Therefore, it is interesting to compare how different jurisdictions in other countries address asymmetrical information and investor protection. Although most scholarly journals about regulatory response to address information asymmetry come from developed countries such as the

[633] R. C. Sweeting and C. F. Wong, 'A UK `Hands-off' Venture Capital Firm and the Handling of Post-investment Investor--Investee Relationships' (1997) 34(1) *Journal of Management Studies* 125, 147-8.

[634] Jason W. Parsont, 'Crowdfunding: The Real and the Illusory Exemption' (2014) 4 *Harvard Business Law Review* 281, 285.

[635] Akerlof (n 570) 488.

[636] Tomboc (n 495) 278.

[637] Vismara (n 114) 581.

[638] Ahlers et al (n 76) 976.

[639] Garry A. Gabison, 'Equity Crowdfunding: All Regulated but Not Equal' (2014) 13 *DePaul Business & Commercial Law Journal* 359, 364.

[640] M. H. Kang et al, 'Understanding the Determinants of Funders' Investment Intentions on Crowdfunding Platforms A Trust-based Perspective' (2016) 116(8) *Industrial Management & Data Systems* 1800, 1815.

[641] Agrawal, Catalini and Goldfarb (n 616) 113.

[642] Gabison (n 639) 362.

US, however, the basic idea that information asymmetry should be reduced to increase investor confidence in equity crowdfunding is universal. What can be differ is that the instrument that can be used to reduce this problem may not be the same in many countries and there is no single approach in many jurisdictions to address information asymmetry. The challenge is to choose sufficient instruments that effectively address this problem.

4.2.3 The primary goal of securities regulation in equity crowdfunding context

Legal scholars differ when it comes to determining the primary goal of securities regulation. Couture argues that it is price accuracy because, in general, the allocation of capital efficiency is promoted by the price accuracy of securities.[643] Pricing accuracy especially in the offering period directly affects the efficient allocation of capital, while in the secondary market, although it does not directly affect the efficient allocation of capital to the issuer, it can influence whether the intermediary is willing to provide further financing, whether the issuer's management is willing to choose debt financing and also carry information to management in relation to the advisability of the investment opportunities.[644] Securities price accuracy also ensures that investors 'invest at fair price', which then subsequently expand the liquidity and capital flow to the market.[645] In addition, the accuracy of pricing decreases the possibility of market bubbles, crashes, and subsequent market crash effects on the overall economy, as well as reduces agency costs since it provides feedback on the management's decision-making.[646] He contends that 'price accuracy is the primary goal of the regulation of offerings, mandatory disclosure, and public company liability'.[647]

Nevertheless, other scholars assert that the primary goal of securities regulation is market efficiency. For example, Goshen and Parchomovsky argue that the role of securities regulation is 'to maintain a competitive market for information traders'.[648] The two important elements of market efficiency are 'share price accuracy and financial liquidity'.[649] Couture maintains this argument is under-inclusive since not

[643] Wendy Gerwick Couture, 'A Glass-Half-Empty Approach to Securities Regulation' (2016) 76 *Maryland Law Review* 360, 366.
[644] Ibid.
[645] Ibid 367.
[646] Ibid 368.
[647] Ibid 370.
[648] Zohar Goshen and Gideon Parchomovsky, 'The Essential Role of Securities Regulation' (2005) 55 *Duke Law Journal* 711, 781.
[649] Ibid 714.

all securities are intended to be publicly traded on 'exchanges or over the counter' (OTC).[650] He then explains that rather than an ultimate goal, market efficiency is the way to achieve accuracy of the securities price, since under 'the Efficient Capital Market Hypothesis' (ECMH), the share price is a reflection of all public information.[651]

However, Mahoney argues that the primary goal of securities regulation, especially mandatory disclosure, is to address agency costs which occur between 'corporate promoters and investors, and between corporate managers and shareholders'.[652] According to the 'agency cost model' the disclosure system aims to diminish self-dealing and management compensation.[653] However, this argument is criticized because agency costs are merely a component of share valuation. Rather, agency cost is considered an effect of share price, as 'accurate share price reduces agency costs'.[654]

Others argue that the key goals of securities regulation are market integrity and market fairness.[655] However, these goals, together with market efficiency and investor protection, form the fundamental goal of securities regulation.[656] Paredes concurs that securities regulation has multiple goals: 'informed investor decision making', decreased agency cost, tackling the lemon problem, and enhancing investor confidence.[657]

Romano asserts that the primary goal of securities regulation is investor protection.[658] Regulation should shield investors from fraud or harm because of 'unsuitably risky investment', which subsequently encourages them to buy and sell securities and generates a robust and liquid capital market. However, this view is considered naive and any regulation based on this belief should be seriously examined.[659] Chang-Hsien Tsai supports this view and maintains that the goal of investor protection

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[650] Couture (n 643) 369.

[651] Ibid.

[652] Paul G. Mahoney, 'Mandatory Disclosure As a Solution to Agency Problems' (1995) 62 *University of Chicago Law Review* 1047, 1048.

[653] Ibid 1111.

[654] Couture (n 643) 370.

[655] Janet Austin, 'What Exactly Is Market Integrity: An Analysis of One of the Core Objectives of Securities Regulation' (2016) 8 *William and Mary Business Law Review* 215, 239.

[656] Ibid.

[657] Troy A. Paredes, 'Blinded by the Light: Information Overload and Its Consequences for Securities Regulation' (2003) 81 *Washington University Law Quarterly* 417, 462-3.

[658] Roberta Romano, 'Empowering Investors: A Market Approach to Securities Regulation' (1997) 107 *Yale Law Journal* 2359, 2402.

[659] Couture (n 643) 237.

has been historically the centre of securities regulation.[660] *The Sarbanes-Oxley Act of 2002*, for example, puts more burdens on companies to strengthen mandatory disclosure and corporate governance.[661] Likewise, stronger measures to protect investors were the rationale for the *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*.[662]

Equity crowdfunding, which uses the crowd's potential investment while employing a lower standard of the disclosure than traditional securities regulation, might be seen as undermining the goal of securities regulation if it is to protect the interest of investors. However, this might not always be the case if regulation can provide sufficient protection for investors, such as establishing fair pricing. Then the argument of Couture, that share price accuracy is the ultimate goal of securities regulation might be achieved. Nevertheless, the post-offer-period can be a problem for accurate pricing to be fairly determined in equity crowdfunding, since the secondary market in equity crowdfunding is typically inexistence.

The agency problem will exist after the period of offering is over. Therefore, equity crowdfunding from the perspective of agency theory need to ascertain that the agency problem can be solved effectively while ensuring the long-term protection for investors. Rather than seeing price accuracy as the main goal of securities regulation, in the equity crowdfunding context, one should also consider that investor protection and agency problems are relevant to securities regulation. Finally, for market efficiency, unless there is a secondary market for investors to trade their shares, this goal is not too relevant for equity crowdfunding regulation.[663]

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[660] Chang-Hsien Tsai, 'Legal Transplantation or Legal Innovation: Equity-Crowdfunding Regulation in Taiwan after Title III of the U.S. Jobs Act' (2016) 34 *Boston University International Law Journal* 233, 237.

[661] Ibid.

[662] Ibid.

[663] This section is intended to provide a brief explanation about the different opinion among scholars concerning the primary goals of securities regulation and its relevance for equity crowdfunding regulation. Further discussion about ECMH, types of ECMH and its impact to the regulatory policy of securities market see for example Christopher Paul Saari, 'The Efficient Capital Market Hypothesis, Economic Theory and the Regulation of the Securities Industry' (1977) 29 *Stanford Law Review* 1031, 1070-75; Mark H. Van De Voorde, 'The Fraud on the Market Theory and the Efficient Markets Hypothesis' (1988) 14 *Journal of Corporation Law* 443, 473-7; and Jim Haslam, Jiao Ji, and Hanwen Sun, 'Towards a Well-functioning Stock Market in Context-Critically Appreciating Issues in Interpreting Efficient Markets Research and Its Regulatory Implications' (2018) 2 (1) *Journal of Capital Market Studies* 21, 25-8. See also Walker who argue that efficient markets hypothesis is irrelevant with the primary goals of securities regulation, in Gordon Walker, 'Securities Regulation, Efficient Markets and Behavioural Finance-Reclaiming the Legal Genealogy' (2006) 36 *Hong Kong Law Journal* 481, 483-4.

4.2.4 Appropriate regulation to support equity crowdfunding development

Facilitating a suitable environment for equity crowdfunding would be a better policy option. Legislation in the home country would significantly influence its market development.[664] Nehme argues that an appropriate regulation for equity crowdfunding should reflect its reality.[665] Regulating equity crowdfunding in a similar way to traditional funding could lead to its deterioration.[666] Strict regulation in offering securities has restricted the development of equity crowdfunding in many countries.[667] Consequently, domestic businesses would move their businesses abroad and seek crowdfunding from other countries to fund their innovations.[668] Likewise, domestic investors would tend to invest in other jurisdictions that have regulated crowdfunding.[669]

Hornuf, Lars, and Armin Schwienbacher provide an example of regulatory exemption discouraging equity crowdfunding. They found that a funding gap occurred in a securities offering with a low threshold because the amount of capital raised was also low,[670] potentially discouraging firms from obtaining funds. This situation had happened in Germany where the exemption from the issuing prospectus was considered low at €100,000 (A$164,000).[671] While many issuers have higher capital needs and funds from the crowd are satisfied with the offer in a short time, the development of the market is restricted by the existing low threshold.[672]

Based on the three theories and their growth in equity crowdfunding practice and regulation, this study develops a conceptual framework as follows. It describes the inter-relation between theories, stakeholders in equity crowdfunding, and the response of regulation in some developed countries. Developing countries can use legal borrowing to address issues concerning regulating equity crowdfunding. However, during the implementation the regulator in developing countries can refine the regulation, assess its effectiveness, and make appropriate changes to increase its implementation.

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[664] Ahlers et al (n 76) 958.
[665] Nehme (n 483) 118.
[666] Ibid.
[667] Ahlers et al (n 76) 958.
[668] Corporations and Markets Advisory Committee (n 118) 13.
[669] Ibid 12.
[670] Lars Hornuf and Armin Schwienbacher, 'Should Securities Regulation Promote Equity Crowdfunding?' (2017) 49(3) *Small Business Economics* 579, 591.
[671] Ibid.
[672] Ibid.

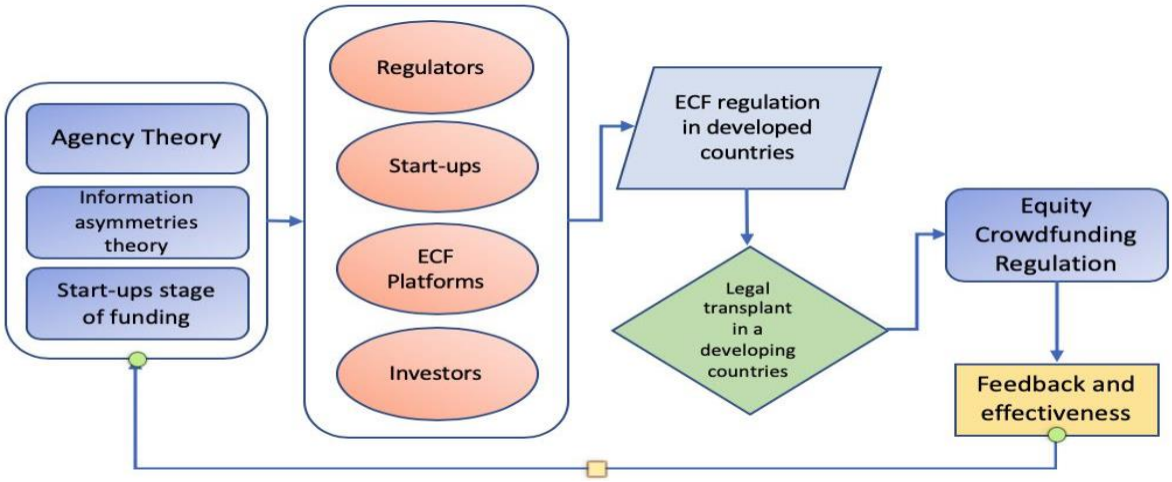

Figure 4.2: Conceptual Framework: Legal Transplant of Equity Crowdfunding Regulation in a Developing Country

Chapter 5 : Research Methodology

This chapter discusses the methodology used for this study. It describes the qualitative research, the interview process and participants, ethical considerations, validity and reliability, and the research design.

This study employs a qualitative research method and the comparative law method to complement each other. Using more than one method provides richer detail rather than using only one method.[673] Qualitative methods were used to understand the participants' perceptions concerning the equity crowdfunding in Indonesia. Subsequently, comparative law was used to expand the discussion of equity crowdfunding regulation to include regulatory systems from other countries. Therefore, this study uses two separate methods but integrates the results of the analyses. While the analysis of the data from qualitative methods will remain separate in the result chapter (Chapter 6), the discussion of the findings will combine the two methods to make it more informative.[674] Lastly, the thesis will propose recommendations based on discussion of the research findings.

5.1 Qualitative Research Design

The qualitative method was chosen to better understand the complexities and details of the issue by communicating directly with relevant persons and asking them to tell their stories in the context of what the researcher knows from the literature.[675] Maxwell asserts that qualitative research methodologies can help understand 'the meaning, for participants in the study, of the events, situations, experiences, and actions they are involved with or engage in'.[676] Creswell explains that qualitative research is suitable to address research questions where variables are not known and need to be explored, and the researcher can explore the phenomenon with participants.[677] In

[673] See M M. W. Risjord, S. B. Dunbar and M. F. Moloney, 'A New Foundation for Methodological Triangulation' [269] (2002) 34(3) *Journal of Nursing Scholarship* 269, 269.

[674] See Moran-Ellis et al. who discuss the difference between combining methods, integrated methods and separate methods-integrated analysis in their article Jo Moran-Ellis et al, 'Triangulation and integration: Processes, Claims and Implications' [45] (2006) 6(1) *Qualitative Research* 45, 54-5.

[675] John W. Creswell, *Qualitative Inquiry & Research Design: Choosing Among Five Approaches* (Thousand Oaks: Sage Publications, 2nd ed, 2007) 40.

[676] Joseph Alex Maxwell, *Qualitative Research Design : an Interactive Approach* (Thousand Oaks, California: SAGE Publications, 3rd ed, 2013) 92.

[677] John W. Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (Sage Publications, 4th ed, 2014) 20.

qualitative research, according to Denzin and Lincoln, the researcher makes the world visible by interpreting 'the material practices', meaning that they transform it into a series of 'representation[s]' such as 'field notes, interviews, conversations, and recordings'.[678] They explain that in a qualitative study: "… qualitative researchers study things in their natural settings, attempting to make sense of, or interpret, phenomena in terms of the meanings people bring to them." Jackson, Drummon, and Camara mention that studying 'a phenomenon in its natural situation is often the optimal way to examine what is happening'.[679] However, they note that although the perspectives concerning a phenomenon can be different from one individual to another, in reality these perspectives influence social behaviour and relationships.

Rogers and Willig emphasise that qualitative research in social science is empirical since it involves gathering the data, analyse and interpret it, and drawing conclusions from it.[680] They explain that the data can be in the form of interview transcripts, video recordings, messages, pictures, or photographs. They assert that conclusions are made based on the researcher's engagement with the materials, which is part of the social world being studied. Therefore, the researcher is the instrument of the research to analyse and interpret the data.[681] Reflexivity is a tool that will enable the researcher to do the data analysis.[682]

The nature of qualitative research differs substantially with quantitative research. Campbell notes several of quantitative research's characteristics.[683] Firstly, the researcher collects the data and employs numerical and statistical analysis, which may include standard deviation, mean, and a t-test to support or refute a hypothesis. Secondly, the outcome of the research typically can be generalisable, expected, and 'provide a causal explanation'. Thirdly, the role of the researcher is impartial and separate from the object of the research. Finally, the sampling method usually uses random sampling or another sampling method to represent the population of the research statistically.

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[678] Maxwell (n 676) 36-7.

[679] Ronald L. Jackson, Darlene K. Drummond and Sakile Camara, 'What is Qualitative Research?' [21] (2007) 8(1) *Qualitative Research Reports in Communication* 21, 27.

[680] Wendy Stainton Rogers and Carla Willig, 'Introduction' in Carla Willig and Wendy Stainton Rogers (eds), *The SAGE Handbook of Qualitative Research in Psychology.* (SAGE Publications, 2nd ed, 2017) 7.

[681] Ibid.

[682] Ibid.

[683] Suzanne Campbell, 'What is Qualitative Research?' (2014) 27(1) *Clinical Laboratory Science: Journal Of The American Society For Medical Technology* 3, 3.

5.1.1 Sampling for interviewees

The most appropriate sampling method for this study is purposive sampling due to the lack of a sampling frame, specifically the criterion sampling method. Lawrence defines purposive sampling as '… a non-random sample in which the researcher uses a wide range of methods to locate all possible cases of a highly specific and difficult-to-reach population'.[684] Purposive sampling offers rich information from participants and is commonly used in a qualitative study.[685] Margrit explains that information-rich refers to the selection strategy that can lead to 'answering the research question'.[686] She continues to explain that there are several purposive sampling strategies, such as theoretical sampling which was developed in relation to grounded theory; stratified purposive sampling which select 'a heterogeneous sample that represents different manifestations of the phenomenon under study'; and criterion sampling which chooses the samples based on a pre-determined criterion or profile, usually a combination which enables in-depth exploration the phenomenon under study.

Fieldwork was conducted in Indonesia from November 2018 to early March 2019. Jackson, Drummon, and Camara define fieldwork as the researcher's activities at the physical site of the subject or object of the research by 'listening, observing, conversing, recording, interpreting, and dealing with logistical, ethical, and political issues'.[687] Initially, the researcher sent emails to several potential venture capital and angel investors asking them to participate in the study and providing information about it. However, after weeks, there was not a single response to the emails. Searching for the right participants for this study was not an easy task. The researcher also asked former colleagues in the FSA for contact numbers of the venture capital and angel investors. But, communication via telephone or mobile phone messages also failed to elicit a response. The researcher then contacted officials in the FSA who knew the contact person in *Asosiasi Modal Ventura Untuk Start-up Indonesia*/Amvesindo (Indonesian Venture Capital for Start-up Association). After that, everything became easier. The Head of Amvesindo made initial contact with two of the largest domestic venture capitals in Indonesia and then advised the researcher to contact them. Although the researcher was

[684] W. Lawrence Neuman, *Social Research Methods: Qualitative and Quantitative Approaches* (Pearson Education Limited, 7th ed, 2013) 273.

[685] Margrit Schreier, 'Sampling and Generalization' in Uwe Flick (ed), *The SAGE Handbook of Qualitative Data Collection* (SAGE Publications Ltd, 2018) 84, 88.

[686] Ibid.

[687] Jackson, Drummond and Camara (n 679) 26.

unable to contact any angel investors from the Angel Investor Indonesia Association (ANGIN), fortunately, one high school friend informed that he knew an angel investor as well as a director in a big IT and server company in Jakarta. The researcher interviewed him in his office.

A 'snowballing approach', was used to find suitable participants from start-up companies. Initially, several start-up companies were contacted by email informing them about the project and asking them to participate. To gain rich information for this study the researcher sought start-up companies which had experience of seeking funding, doing presentations in front of funders, participating in a pitching competition for funding, having negotiations with funders, or receiving funding from venture capitals or angel investors. However, only one start-up company agreed to participate. Other participants were then contacted through snowball sampling by asking interview participants to recommend potential start-up companies and introduce the researcher to them by making initial contact via email or phone.

Equity Crowdfunding is considered a new phenomenon in Indonesia. When the researcher was conducting fieldwork, the Indonesian FSA had just released the regulation of equity crowdfunding at the end of 2018. Not all businessmen or investors in the capital market were familiar with the term equity crowdfunding. Every participant chosen for this research had an understanding of crowdfunding. Donation crowdfunding has been in existence for several years. Kitabisa.com[688] was established in 2013 and has become the most significant fundraising platform in Indonesia. Up to March 2019, it facilitated more than Rp637 billion (A$65 million) donations. P2P lending has also been growing significantly and has been regulated by the FSA since 2016.

There were 22 participants chosen for this study as follows:

No	Institutions	No. of Participants
1	Financial Services Authority (FSA) of Indonesia	3
2	Ministry of Finance	3
3	Creative Economic Agency	1
4	Potential or P2P Crowdfunding Platform	3
5	Start-up companies	8
6	Venture Capitals/Angel Investors	4

[688] kitabisa.com, 'Sejarah Kitabisa' <https://kitabisa.com/about-us>.

5.1.2 Data collection

There are several methods of data collection in qualitative research. Gill, Stewart, Treasure, and Chadwick [689] explain that qualitative research commonly employs observation, textual analysis, and interviews which are, the most commonly used method. There are three types of interviews. The first is the structured interview with predetermined questions. The list of the questions is prepared before the interview since, during the interview, there is usually little room for following up questions or variations. Therefore, this type of interview is usually not intended in-depth. The second type is the unstructured interview which uses a broad question to open the interview with follow-up questions asked in response to the interviewee's answer. This type of interview is often time-consuming and lacks focus since there is little to no guidance. The semi-structured interview uses a list of several key questions to guide the researcher during the interview and to explore more information from the participants.

This study uses in-depth semi-structured interviews. There are several constraints to this interview process. When the potential participants were contacted during October and November 2018, the Indonesian FSA had prepared a draft of the regulation on equity crowdfunding regulation. At that time, it was seeking input from relevant industry players, associations, potential stakeholders of equity crowdfunding such as potential platforms, and start-up companies. As equity crowdfunding in Indonesia is a new phenomenon, most of the potential participants were reluctant to be interviewed. Therefore, the researcher used informal communication to contact potential participants. The other constraint was that most participants were busy people, especially at the end of 2018 because of the long Christmas holiday. Occasionally, the interview time had to be rescheduled more than once. Fortunately, communication with many participants was easier in February and March 2019, after the FSA regulation on equity crowdfunding had been released on 31 December 2018. Therefore, except for one participant who was interviewed before the release of the regulation, all other participants were interviewed after its release. All interviews were conducted in Bahasa Indonesia and were recorded on a digital voice recorder. The researcher transcribed and translated the interviews which was a lengthy process.

[689] P. Gill et al, 'Methods of Data Collection in Qualitative Research: Interviews and Focus Groups' [291] (2008) 204(6) *British Dental Journal* 291, 291.

5.1.3 Design of the interview guide

The interview guide (see Appendix G) was carefully designed with the presumption that equity crowdfunding was new for most participants, since it had no market in Indonesia at the time of the fieldwork, although the P2P lending market had existed since its regulation in 2016. It is important to remember that no law prohibits lending and borrowing activities in Indonesia which generally follow the rule of contracts in the Dutch civil and commercial code. The FSA regulation is intended to protect consumers or users of P2P lending and to protect the national interest from money laundering, terrorism financing, and disruption of financial system stability (see the general explanation of the FSA rule on P2P lending year 2016).

Therefore, the interview guide moved gradually from the level of familiarity of participants with crowdfunding to focusing more on equity crowdfunding, thus enabling the researcher to understand the level of participants' knowledge of crowdfunding and equity crowdfunding. This was a good strategy as an ice breaker and, at the same time, made participants more confident about answering the next question. If the question directly asked about equity crowdfunding, there was a possibility that participants would not understand its context.

The interview guide was created as a set of open-ended questions. To avoid yes or no answers, the design asked participants to choose one of the available options and then ask the reason for their choice. This design was to anticipate if they wanted to see the questions before the interview. Therefore, providing available options for the answers gave them confidence that the interview would not ask difficult questions that they were unable to answer. The questions were designed in simple and direct language to avoid misperceptions. They were designed to explore their perceptions and experiences and generate information. The interviewer would ask follow-up questions if participants provided valuable information.

Consequently, the interviews did not always follow the order in the interview guide. For example, after the first question, one participant told his experience and perception in a story-mode but covered almost all the questions. This participant had asked to see the interview guide before the interview to ascertain if he was the right person to participate. Another interviewee discussed the legal aspects in relation to the regulation and supervision of the equity crowdfunding activities. The researcher considered it was better for the discussion to flow according to the participant's expertise, rather than

following the interview guide. Since the background of the participants varied, the interviewer could often predict if there would be any deviating from the interview guide and prepare a set of suitable questions (see Appendix B).

5.1.4 Data analysis

The purpose of data analysis is to create meaning from the data. It involves 'consolidating, reducing, and interpreting the data'.[690] The procedure is a back-and-forth process between the concepts and the data, between the inductive and deductive approach, and between data description and data interpretation.[691]

After the interview process, the transcriptions of the interviews were created and then translated into English. Braun and Clarke's thematic analysis was used for analysis in this study. They explain six steps for doing thematic analysis.[692] First, the researcher must be familiar with the data. In this study, the researcher conducted and recorded the interviews in an audio file and afterward transcribed them without any assistance from others. Therefore, the researcher had the opportunity to know the context of the interview, wrote the transcription as soon as the interviews were completed, and read the interview transcripts several times to find the concepts and meaning of the data. Second, 'generating initial codes' was completed after reading the transcript to find concepts and meaning. Initial codes were generated based on the words, phrases, or concepts from the literature review and transcript of the interviews. Third, 'searching for themes' meant codes that had been generated were organized and grouped to find any relevance and create themes. Braun and Clarke suggest using visual representation in this process, such as tables and mind-maps.[693] Fourth, reviewing themes involved checking initial themes to find a coherent pattern and create a candidate thematic map which reflects the whole data set. Fifth, was 'defining and naming themes' to identify their substance and determine the scope of the data in each of them. The detailed description of the themes is important to be able to 'identify [the] story that each theme tells'. Complex themes can be divided into subthemes, so that 'hierarchy of meaning within the data' can be demonstrated. Lastly, 'producing report', the final step, was writing an

[690] Sharan B. Merriam and Elizabeth J. Tisdell, *Qualitative Research: a Guide to Design and Implementation* (Jossey-Bass, 4th ed, 2016) 202.

[691] Ibid.

[692] Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3(2) *Qualitative Research in Psychology* 77, 87-93.

[693] Ibid 91.

analysis chapter in this thesis based on the themes in 'a concise, coherent, logical, non-repetitive, and interesting account'.[694]

The data was analysed using NVivo [695] to identify and understand the pattern of the data. All transcripts of the interviews which had been translated into English were uploaded to the NVivo file. The coding itself was based on the back-and-forth process between the literature and the transcripts. NVivo provided simple links between the codes and their relevant in the transcripts. Therefore, reorganisation and rearrangement of the existing codes became automatically connected to the transcript sources. Emerging codes that had a similar or close connection in meaning were further grouped to create categories, themes, and subthemes using NVivo.

The researcher used the MindNode program [696], a mind mapping application, to group codes into categories and then categories into themes. While NVivo can be used to create categories, its visual display to organise the codes has limitations. The MindNode helped to organize the codes far more easily since it is based on a visual and colourful display of different nodes. Afterward, the codes in NVivo were adjusted to mirror the organization of the codes in MindNode.

5.1.5 Validity, reliability and triangulation

Kirk and Miller argue that in general, reliability and validity are two components to measure objectivity in qualitative research, as well as components of objectivity in quantitative research.[697] Broadly speaking, the term reliability refers to 'the extent to which a measurement procedure yields the same answer however and whenever it is carried out', and the term validity refers to 'the extent to which it gives the correct answer'.[698] Some qualitative researchers argue that reliability and validity are only applicable in quantitative research and inappropriate to express rigor or trustworthiness in qualitative studies and therefore suggest replacing the terms with new evaluation standards which encompass 'the overall significance, relevance, impact, and utility of

[694] Ibid.

[695] This study used NVivo 12 to help analyse the data.

[696] MindNode offers to help users organize ideas and visual brainstorming. The idea basically is mind mapping, but the visual display in MindNode is simple and easier to reorganize. See MindNode, 'About' <https://mindnode.com/about>.

[697] Jerome Kirk and Marc L. Miller, *Reliability and Validity in Qualitative Research* (Sage Publications, 1986) 14, 17.

[698] Ibid 19.

completed research'.[699] Nevertheless, the two terms have continued to be accepted by many qualitative researchers in Europe and the US who believe that the broad idea of reliability and validity is important and can be applied to qualitative inquiry.[700] Morse et al. proposed that the paradigm debate concerning qualitative research rigor should not cause the focus of its evaluation to be placed at the end of the research process, but should be conducted during the process. Therefore, researchers have the opportunity to correct their research during rather than at the end of the process.[701]

There are several strategies to ensure reliability and validity in qualitative research. Merriam and Tisdell suggest using triangulation, respondent validation, 'adequate engagement in data collection', 'researcher's position or reflexivity', peer review, audit trail, thick description, and maximum variation.[702] Morse et al. recommend, first, methodological coherence between the research questions and the method components; second, an appropriate sample; third, a mutual interaction between data collection and analysis; fourth, thinking theoretically; and lastly, theory development.[703]

This study uses triangulation by employing more than one research method and source to answer the research questions. This strategy in qualitative research involves the use of different methods, sources, or theories 'to capture social reality' more comprehensively, since the nature of social objects is multidimensional.[704] The use of more than one method as triangulation can enhance the quality of qualitative study and extend the knowledge of the researcher.[705] The use of different sources of information also tests validity.[706]

This study started by examining the literature to construct the interview guide. The participants came from different backgrounds, professions, and locations of start-up companies in several cities in Indonesia. Other sources used in this study are legal rules and laws documents which were relevant to answering the research questions. Therefore,

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[699] Janice M. Morse et al, 'Verification Strategies for Establishing Reliability and Validity in Qualitative Research' (2002) 1 *International Journal of Qualitative Methods* 13, 14-5. See also Jude Spiers et al, 'Reflection/Commentary on a Past Article: "Verification Strategies for Establishing Reliability and Validity in Qualitative Research"' (2018) 17 *International Journal of Qualitative Methods* 1, 1.

[700] Morse et al (n 699) 14.

[701] Ibid 14-5.

[702] Merriam and Tisdell (n 690) 259.

[703] Morse et al (n 699) 18-9.

[704] See Helena Bilandzic, 'Triangulation' in W Donsbach (ed), *The International Encyclopedia of Communication* (Blackwell Publishing, 2008).

[705] Uwe Flick, *Designing Qualitative Research* (SAGE Publications, 2007) 43-4.

[706] Nancy Carter et al, 'The Use of Triangulation in Qualitative Research' (2014) 41(5) *Oncology Nursing Forum* 545, 545.

both sources complemented each other, since the study was able to collect the perspectives of participants, analyse appropriate regulation based on the data and themes from the interviews, assess the current equity crowdfunding regulation in Indonesia, and compare it with foreign regulations from several common law countries.

To achieve content validity, the construction of the interview guide took into account research objectives and recurring themes from the literature review. Then during the interview process the guide was adjusted according to the perceptions of participants about equity crowdfunding in Indonesia. The interviews were conducted carefully to achieve validity and reliability in relation to transcribing and analysing the materials.[707] Categories arising from the interview transcripts were developed to complement those in the interview guide. Because the researcher transcribed all the interviews and translated them into English the context of the interview was clear.

To determine appropriate sample size, this study followed Francis et. al.'s concept of data saturation where justification of the sample size means that participants cannot provide additional new data to develop conceptual categories.[708] This study found that after the number of participants had reached 22 in all categories of participants, there was no new data from the interviews, content tended to be repeated and new categories and themes became hard to find.

5.1.6 Ethics approval and confidentiality of participation information

This research involved humans as participants in the interview process for data collection. Although the research was considered low risk, it needed approval from the Human Research Ethics Committee to ensure it was conducted with high ethical standards and met all the requirements of the Australian Government National Statement on Ethical Conduct in Human Research (2007). The ethics approval was obtained from the Victoria University Human Research Ethics Committee in October 2018.[709] The acquittal report

[707] Svend Brinkmann, *Qualitative Interviewing* (Oxford University Press, USA, 2013) 80.

[708] J. J. Francis et al, 'What is an Adequate Sample Size? Operationalising Data Saturation for Theory-based Interview Studies' (2010) 25(10) *Psychology & Health* 1229, 1229-30. See also Ray Galvin, 'How many interviews are enough? Do qualitative interviews in building energy consumption research produce reliable knowledge?' (2015) 1 *Journal of Building Engineering* 2, 9. Galvin criticizes the argument that to set a certain number of participants as a standard of adequacy in determining the appropriate number of participants is not wise since it lacks theoretical foundation and is based on past experiences. But see Guest et al. who argues that the number of six to twelve interviews 'will always be enough to achieve a desired research objective' in Greg Guest, Arwen Bunce and Laura Johnson, 'How Many Interviews Are Enough? An Experiment with Data Saturation and Variability' (2006) 18(1) *Field Methods* 59, 79.

[709] See Appendix F.

which meets the ethics clearance requirements of the Victoria University was lodged in December 2019 to the satisfaction of the Chair of the Ethics Committee.

All participants in the study were over 18 years of age and were living in Indonesia. It was assumed that English language was not their preferred language for the interview. Therefore, Bahasa Indonesia was used for all the interviews and recorded on a digital voice recorder. The transcripts of the interviews were written in Bahasa Indonesia and then translated into English. The consent form[710], information to participants[711], and invitation letter (email)[712] were translated in Bahasa Indonesia by a sworn translator to ensure that participants were aware of the contents of the form.[713]

Informed consent from research participants is a requirement that must be fulfilled. Swerdlow and Macrina assert that the information given for the purpose of getting informed consent should ensure a comprehensive explanation of the study, as well as its potential risks and benefits for the participants, is fairly presented.[714] They also explain the importance of informed consent not only at the beginning of an interview but as an ongoing process.[715] Oliver prefers to use the word 'the nature of the research project' as a prerequisite for a fully informed decision by participants to provide consent.[716] It should be given voluntarily and at a sufficient level of information.[717] Furthermore, understanding the project and its implication is also indispensable.[718] The consent form for this study was explained in plain language to the participants in Bahasa Indonesia.[719] Before they signed they were informed about the survey form, the procedure of the study was explained, and they were informed that they could withdraw from the study at any time.

[710] See Appendix C.
[711] See Appendix D.
[712] See Appendix E.
[713] See Kathleen Marie Brelsford, Laura Beskow and Ernesto Ruiz, 'Developing Informed Consent Materials for Non-English-Speaking Participants: An Analysis of Four Professional Firm Translations from English to Spanish' (2018) 15(6) *Clinical Trials* 557, 557. Their study discussed the translation of consent material to ensure that it was understandable for participants.
[714] Paul S. Swerdlow and Francis L. Macrina, 'Use of Humans in Biomedical Experimentation' in Francis L. Macrina (ed), *Scientific integrity: text and cases in responsible conduct of research* (ASM Press, 4th ed, 2014), 142.
[715] Ibid 139.
[716] Paul Oliver, *The Student's Guide to Research Ethics* (McGraw-Hill International (UK) Ltd., 2010) 15.
[717] See National Health and Medical Research Council, 'National Statement On Ethical Conduct In Human Research' (Australian Government, 2007), 16.
[718] Ibid.
[719] See Appendix C.

Studies reveal that it is common for some participants not to adequately understand the purpose of the research.[720] Since this study was conducted in Indonesia, a developing country, participants possibly might not understand the purpose of the research. To ensure that they received information about the aim of the study, its risks and benefits, how their information would be used, and how the study would be conducted, all participants received a document entitled 'information to participants involved in the research'.[721] On several occasions, before the interview began, the researcher took additional time to explain the purpose of the research. The requirement for informed consent was designed to make participants more confident, to encourage their participation, and allow them to ask questions if they required more clarification about the study.

Issues of confidentiality might arise because the interviewees might provide unpublished data, especially relating to the names of people or entities and this needed to be clarified with participants.[722] The National Statement on Ethical Conduct in Human Research (NSECHR) mentions that confidentiality is one of the important matters about which participants should be informed.[723] The nature of confidentiality comes from either its content or the 'context of its communication', and can only be used if it meets mandated permission.[724] Thus, whether or not information is classified as confidential should be viewed both in content and context, and should be disclosed to participants from the beginning.

To ensure confidentiality, the researcher asked the participants to select whether they wanted to use a real name, anonym, or pseudonym. Oliver explains that participants might still feel nervous when the interview is being recorded, even though the researcher has provided assurances about confidentiality.[725] Therefore, the researcher followed Oliver's suggestion to explain that the digital recorder was being placed in a reachable area near them so that participants could re-record their information to accurately reflect their responses. During the interview, the researcher sometimes reminded the participants that they might choose not to disclose confidential information.

[720] Nancy E. Kass et al, 'A Pilot Study of Simple Interventions to Improve Informed Consent in Clinical Research: Feasibility, Approach, and Results' (2015) 12(1) *Clinical Trials* 54, 54.
[721] See Appendix D.
[722] Oliver (n 716) 15.
[723] National Health and Medical Research Council (n 717) 17.
[724] Ibid 100.
[725] Oliver (n 716) 47.

Measures were taken to ensure that access to the confidential information was restricted and not accessible to unauthorized persons. To meet the requirement that confidential data must be saved in secure storage,[726] the audio record of the interviews, all transcriptions, and the consent of the participants was stored in research data storage (electronic data) at Victoria University and secured by a password. Only the researcher and supervisors have access to this data storage. After all the transcriptions of interviews and consent forms of participants were scanned and stored in the data storage, the hard copy of the data was destroyed, and no physical data remained.

5.2 Comparative Law

The term comparative law, initially used in the 19th century can be used as a method of study or as 'a branch of social science'.[727] Cruz defines it as:[728]

> … a method of analyzing the problems and institutions originating from two or more national laws of legal systems, or of comparing entire legal systems in order to acquire a better understanding thereof, or provide information, and insight into, the operation of the system's institutions or the systems themselves.

Consistent with Zweigert and Kotz's approach, Cruz suggests that determining 'the classification of a legal system' is based on several criteria which are[729]: (a) the historical background and development of the system; (b) its characteristic (typical) mode of thought; (c) its distinctive institutions; (d) the types of legal sources it acknowledges and its treatment of these; and (e) its ideology.

5.2.1 Reasons why the comparative law is used

This study uses comparative law because it offers many advantages. Zweigert and Kotz assert that it is frequently used because the legal system does not provide a satisfactory singular solution to many issues, as well as intellectual satisfaction in this regard.[730] The other advantages of using comparative law is to extend knowledge about economic and social conditions in which the legal norms or legal system operate.[731] Xanthaki explains that legislative drafters use comparative law for several reasons such as harmonizing laws, law reforms, facilitating changes in the economic or social sphere,

[726] National Health and Medical Research Council (n 717) Chapter 3.1, Element 4.
[727] De Cruz (n 403) 7.
[728] Ibid 9.
[729] Ibid 38.
[730] Ibid 236-7.
[731] Ibid 230.

looking for solutions to problems in the domestic affairs, or gaining perspectives about a country's law and theoretical norms.[732]

Comparative law is broader than discussing aspects of law. It also encompasses regulation, customs, and practices. Cruz suggests that comparatists should not omit the extra-legal phenomena that may significantly influence 'the state of the law', such as 'informal custom and practices' and other non-legal factors which work outside the formal law.[733] Although one can argue that the definition of regulation is now broader than legal rules or state regulations and regulation from non-state regulatory actors, the broad definition should not prevent comparative lawyers from reconsidering its position and adapting to new developments.[734] Pizzola suggests that in the age of global financial regulation, comparative law should adapt its role and play a crucial part in 'the debate on regulation of financial markets' and provide an understanding of how different systems work and the interrelation between local and international law, as well as comparing 'between different levels of regulation'.[735]

5.2.2 Functionality principle of comparative law and its weaknesses

The functionality principle is still the dominant method of comparative law, despite many criticisms from comparative law scholars.[736] Zweigert and Kotz explain that functionality is the basic principle of the methodology of comparative law which determines the choice of legal system to be compared, the extent of the study, and 'the creation of the system of comparative law'.[737] Therefore, they suggest that in the functional approach the question of comparative law that must be asked is: "… what function does the rule under scrutiny fulfil in its own society? Alternatively, which institution, legal or otherwise, fulfils the function under scrutiny in this particular society?" [738]

Cruz supports the functionality perspective of comparative law as explained by Zweigert and Kotz.[739] However, he emphasizes that different societies encounter

[732] Xanthaki (n 303) 659.
[733] De Cruz (n 403) 230.
[734] Agnese Pizzolla, 'Comparative Law and Financial Regulation: Methodological Remarks' (2013) 3(2) *Irish J Legal Stud* 118, 128.
[735] Ibid 137-8.
[736] Oliver Brand, 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies' (2006) 32(2) *Brooklyn Journal of International Law* 405, 405, 409.
[737] De Cruz (n 403) 236-7.
[738] Ibid 237.
[739] Ibid 237-8.

different problems.[740] As a result, different societies solve questions differently, such as (1) How to solve certain situations? (2) Does it need strict requirements? (3) Should it be criminalized? At this point, many people are only 'examining the content of their laws rather than the reasons for it, or the functions it fulfils'. Zweigert and Kotz observe that although different societies solve problems differently, the result is often similar.[741] Therefore, referring to examples drawn from different legal system they conclude that the '*praesumptio similitudinis'* is 'a valid presumption' because it drives comparatists to discover the similarities and verify the result at the final stage of the study.[742]

As a consequence, functionality asks the question of what is the social problem which needs to be addressed by the legislative drafters.[743] Although they sometimes can address the social needs by discussing the available options and immediately link the phenomenon under consideration with selected options, often the real social problem is hidden and not expressly stated in the explanatory materials.[744] The task of the drafters to identify the real 'social need and to use it as a criterion of comparability' will then not be simple.[745]

5.2.3 The relationship between law, culture, and society

The opponents of functionalism maintain that law cannot be separated from its culture and the context within society. Legrand argues that legal culture is the root of law and it can only function properly as part of a larger system in society.[746] Since legal rules are embedded in society, and each legal culture is unique, law cannot be understood without taking into account the social, historical, political, and linguistic dimensions.[747] For Frankenberg, functionalism neglects the fact that the legal system and legal institutions are the answer to problems that exist as part of a social system.[748] Each legal rule, doctrine, or case should be seen as an intersection of many elements within social process.[749]

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[740] Ibid.
[741] Ibid.
[742] Ibid 239.
[743] Xanthaki (n 303) 662.
[744] Ibid 662.
[745] Ibid.
[746] Pierre Legrand, 'Foreign Law: Understanding Understanding' (2011) 6 *Journal of Comparative Law* 67, 109.
[747] Pierre Legrand, 'On the Singularity of Law' (2006) 47 *Harvard International Law Journal* 517, 524. See also Pierre Legrand, 'How to Compare Now' (1996) 16 *Legal Studies* 232, 238.
[748] Gunter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 *Harvard International Law Journal* 411, 435.
[749] Ibid 454.

Nevertheless, the proponents of functionalism provide counterarguments that in reality the functional principle of comparative law has worked throughout history. Cruz asserts that legal rules may survive in an environment that is very different from its origins without any requirement of 'close connection to any particular people, a particular period of time or particular place'.[750] Watson provides an example of Roman law that survived in many civil law countries with diverse cultures and geography, such as Germany and Paraguay, as well as Japan.[751] He argues that a legal rule 'operates on the level of ideas' while at the same time it is 'being part of the social culture'.[752] As an illustration, he explains that the US borrowed the idea of separation of powers from Montesquieu.[753]

This thesis follows Husa's views which provide a middle position. He maintains that functionalism is still 'a reasonably solid methodological ground for comparative analysis of developed legal systems'.[754] However, it must understand its limitations.[755] He argues that:[756]

> Moderate functionalism, acknowledging its blind spots, may be conceived as a certain point of comparative view fit for studying legal norms, legal doctrines and judicial practice which it sees as the main objects of comparison.

Criticisms of functionalism in comparative law do not reduce its beneficial nature as a source of legal harmonization and reform in many developed and developing countries. Therefore, this study considers that comparatists should be aware of the advantage and limitations of comparative law as a method for pursuing legal reform or harmonization.

5.3 How the structure of this study will be elaborated

De Geest and Van den Bergh suggest that there should be three tasks in ideal comparative law.[757] First, it describes what the rules are. Second, it explains why the rules are there. Lastly, it evaluates whether the rules should be there.

Cruz describes the many functions and purposes of comparative law:[758]

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[750] De Cruz (n 403) 222-3.
[751] Ibid 223.
[752] Alan Watson, 'Comparative Law and Legal Change' (1978) 37(2) *The Cambridge Law Journal* 313, 315.
[753] Ibid 316.
[754] Husa Jaakko, 'Farewell to Functionalism or Methodological Tolerance?' (2003) 67(3) *The Rabel Journal of Comparative and International Private Law* 419, 446.
[755] Ibid.
[756] Ibid 447.
[757] Gerrit de Geest and Roger van den Bergh, 'Introduction' in Gerrit de Geest and Roger van den Bergh (eds), *Comparative Law and Economics* (Edward Elgar Pub., 2004), vol I, x-x.
[758] De Cruz (n 403) 18.

> (a) comparative law as an academic discipline; (b) comparative law as an aid to legislation and law reform; (c) comparative law as a tool of construction; (d) comparative law as a means of understanding legal rules; (e) comparative law as a contribution to the systematic unification and harmonisation of law.

Cruz has different views concerning the task of comparatist in comparative law, emphasizing that the comparatist must not judge whether one legal system is better than the other.[759] Instead, the comparatist should evaluate 'the efficacy of a given solution or approach to a legal problem in terms of that particular jurisdiction's cultural, economic, political, and legal background'. He suggests that there is also a presumption that the comparatist seeks differences between the compared legal systems but should also evaluate similarities. Therefore, Cruz believes that the task of the comparatist is to analyse the effectiveness of the legal system in achieving its goals and objectives; for example by evaluating the situation identified, suggesting instruments to deal with it, exploring how contracting parties within the jurisdiction of the legal system deal with the issue under consideration.

The aim of the comparison determines the selection of what legal systems should be compared. Cruz suggests that these should be at the same stage in their legal evolution, either in political, economic, or social aspects, to provide a baseline for similarities.[760] What Cruz means is not to choose an undeveloped country which uses a barter system for trading and does not recognise commercial law and companies, and compare it with English commercial law.[761] However, referring to Gutteridge, Cruz explains that comparing two different countries which have a different stage of development is not a problem if the aim is to illustrate the operation of the different systems which operate at a different level of legal, social and political evolution.[762]

Xanthaki asserts that while many scholars argue comparatists can only benefit from comparing similar systems and learn from each other, the emphasis should be put on similarities and differences.[763] She argues that when selecting legal systems for comparison for legal transplant, it is important to consider not whether there are similarities between the legal systems, but whether the legal transplant can solve the problems faced by the societies in the recipient countries, and whether the transplanted

[759] Ibid 224.
[760] Ibid 227.
[761] Miller (n 289) 227.
[762] De Cruz (n 403) 227-8.
[763] Xanthaki (n 303) 661.

law can operate effectively.[764] The origin of the transplanted system is not considered not relevant.[765] Xanthaki illustrates that in the current legal drafting of many countries, drafters often do not have quite enough time to enjoy a readymade solution that has already worked well in other countries.[766] On the other hand, in today's globalization where legal integrations and transnational problems require a speedy solution, such as organized crime and cross border terrorism, legislative drafters need to borrow methods, policies or legal solutions which are applicable in other countries, with or without the foreseeable problems produced in the future.[767]

Comparative law is not a set of fixed concepts, but rather a dynamic concept which adapts to its environment. The classification of the legal system established by early scholars is not considered a fixed one.[768] The mixed legal system proves that legal systems can accommodate different legal concepts or norms and develop a plural model which may originate from different legal families.[769]

Whether the outcome of legal transplants will be predictable in the future may be contemplated by legislative drafters when borrowing legal norms from foreign sources. When the Japanese civil code was established by transplanting German civil code, the cultural and socio-economic similarities between the two countries may have been a factor of consideration.[770] Graziadei believes that the choice to borrow from the Western model was motivated by the imagination of the future of Japan.[771]

Scholars have suggested that there are several essential things to consider in the comparative law method. It can be used to make 'qualitative judgments about different legal institutions, structures and rules' and 'propose solutions to specific problems through reference to economic conditions and circumstances'.[772] Samuel urges comparatists to examine not only the rules and laws but also the practice in business and commerce.[773] Close examination of commercial practice will make the comparatists

[764] Ibid 662.
[765] Ibid.
[766] Ibid.
[767] Ibid 661-2.
[768] Graziadei (n 277) 727.
[769] Ibid.
[770] Ibid 727-8.
[771] Ibid.
[772] Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Oxford: Hart Publishing, 2014) 77.
[773] Ibid 134.

understand the purpose of the law.[774] Similarly, Dannemann explains that comparative law can offer solutions about how to improve legal institutions or legal rules by looking at how different legal systems solve similar problems.[775]

Several approaches to comparative studies have been proposed;[776] first, selecting the basis of comparison and choosing the legal systems; second, the description of the 'legal institutions and rules', legal and non-legal context, and the result of any similarities and differences; and third, analysis of the similarities and differences and what can be learned from different legal systems. Another approach is first, the comparatist should have the skills to engage in the 'political, historical, economic, and linguistic context' of the foreign legal system; and second, evaluate the external law, assess the internal law, and 'determine comparative observations' to assemble the result of the analysis.[777] Comparatists use 'primary and secondary sources of law', as well as other relevant sources and consider other pertinent aspects such as the history, socio-economic contexts,[778] religion, ideology, and culture[779]. Mahy explains that the functional approach in comparative law follows several steps to:[780]

> … identify a shared social problem in each place under consideration and define it without recourse to legal terms, find and describe the 'legal' and 'extra-legal' solutions that arise in relation to the problem in each system, identify similarities and differences between the solutions, build a conceptual language capable of discussing all the cases, find explanations for similarities and differences in the wider context and, finally, critically and normatively evaluate the findings.

Functional equivalence has been widely accepted as the basis for micro-comparison in comparative law.[781]

There is no single blueprint for doing comparative law research. Its methodology is open; there is 'no fixed working method'.[782] Based on previous research,

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[774] Ibid.

[775] Gerhard Dannemann, 'Comparative Law: Study of Similarities or Differences?' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2nd ed, 2019) 391, 407.

[776] Ibid 416-21.

[777] Edward J. Eberle, 'The Method and Role of Comparative Law' (2009) 8(3) *Washington University Global Studies Law Review* 451, 458-64.

[778] De Cruz (n 403) 236.

[779] Esin Örücü, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-first Century* (Martinus Nijhoff Publishers, 2004) 24.

[780] Petra Mahy, 'The Functional Approach in Comparative Socio-Legal Research: Reflections Based on a Study of Plural Work Regulation in Australia and Indonesia' (2016) 12(4) *International Journal of Law in Context* 420, 421-2. See also Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Oxford University Press, 3rd rev ed, 1998) 32-47.

[781] Örücü (n 779) 24.

[782] Siems (n 444) 537.

this study adopted the following method. Firstly, the Indonesian legal system will be explained at the macro level by providing a brief history and how existing legal institutions influence how the law in action works. Secondly, at the micro-level, it will explain the specific legal rules of equity crowdfunding regulation and compare how the rules solve the legal problem.[783] A functional approach is preferred to explain why Indonesian business and society need rules. In doing this, a certain degree of similarity should be present in comparing how legal rules or regulations address the social problem. The comparatist must find the institutions that perform the same role or 'solve the same problem'.[784] Lastly, this study will evaluate whether the rules are more beneficial to society than other rules in the different legal systems.

[783] Macro comparison compares the entire legal system of more than one country, while the micro comparison compares two different topics or a certain aspect of the legal system of two countries. See De Cruz (n 403) 233.

[784] Örücü (n 779) 34.

Chapter 6 : Results and Findings

6.1 Introduction

This chapter reports the finding of this study. It identifies themes and sub-themes drawn from interviews with participants. These findings will be used as the basis for further discussion because they are the factual findings from the fieldwork and provide the context for the discussion. These findings provide information about the development and business practices of equity crowdfunding in Indonesia. The questions for participants were designed to collect information relating to their understanding, experiences and perceptions of the sources of funding for start-ups in general and equity crowdfunding and its regulation more specifically (details about the design of the interview question have been discussed in chapter 5).

The findings from the interviews with participants were classified into the following themes.

1. The perceived advantages of equity crowdfunding;
2. The availability of capital from domestic angel investor and venture capital;
3. The role of foreign angel investor and foreign venture capital in Indonesia;
4. Available sources of funding for start-ups in Indonesia;
5. Different perspective on the role of equity crowdfunding;
6. Disclosed information to reduce information asymmetry in equity crowdfunding; and
7. Regulation should address the risk of fraud from scamming, use of funds and false documentation.

6.2 The Perceived Advantages of Equity Crowdfunding

In addressing this theme, participants were asked about the general advantages of equity crowdfunding.

6.2.1 Instrument of funding for start-ups

Equity crowdfunding can be used as an instrument of funding for start-ups (P10), since many have experienced difficulties in obtaining funding from other sources (P17), and therefore are not relying on a single source (P04). Several participants believed that the mechanism of equity crowdfunding was more accessible, either for issuers or investors, and can be a faster way to raise funding (P06 and P02). The platform can

provide technology to facilitate an investment order directly by the investors from the supply side and the start-ups' expression of interest to raise funds from the demand side (P02). Consequently, access to funding for businesses in more extensive regions will increase (P03).

6.2.2 Instrument of investment for more people

The other vital aspect of the equity crowdfunding is that equity crowdfunding can provide direct access for retail investors to invest in a start-up company (P06 and P02). Especially for the millennial generation and urban people, they are 'already interested in things like this. They want to have shares in a start-up company, to own a potential unicorn'[785] (P09). One participant (P11) believed that equity crowdfunding is an excellent opportunity for the Indonesian people to invest in the next unicorn. He explained that:

> … it is not that the Indonesian people do not want to invest in Tokopedia, Bukalapak, Traveloka, and Gojek [several names of the Indonesian unicorns], but because the instruments are not available, an instrument for them to participate.

Equity crowdfunding was considered an excellent way to increase financial inclusion. One participant (P02) maintained that as has been happening in P2P lending, the presence of equity crowdfunding can increase the community's financial services inclusiveness. P02 explained that the crowdfunding introduced financial services through the use of media such as cell phones that increase the exposure of financial services to people who can easily access and receive benefits from financial services. P03 also noted that equity crowdfunding could speed up the process and reach more extensive regions.

6.2.3 Provides a positive contribution to the economy

Many participants believed that equity crowdfunding provided a positive contribution to the economy (P01). Moreover, when the start-ups obtain equity crowdfunding, the fund can support the economic or financial sector (P06). Since it can be used as an alternative form of funding and have a positive effect on the economy, the Government obtains higher revenue from taxes (P09). While start-ups in Indonesia are proliferating, equity crowdfunding will increase employment opportunities (P10 and P06).

[785] The term unicorn is 'used in the venture capital industry to describe a privately held startup company with a value of over $1 billion'. See Investopedia, 'Unicorn', *Private Equity & Venture Cap* <https://www.investopedia.com/terms/u/unicorn.asp>.

Table 6.1: Theme and subthemes related to the perceived advantages of equity crowdfunding

No	Subthemes	ID
1	Instrument of funding for start-ups	P02, P03, P04, P10, P17
2	Instrument of investment for more people	P02, P03, P06, P09, P11
3	Provides a positive contribution to the economy	P01, P06, P09, P10

6.3 The Availability of Capital from Domestic Angel Investor and Venture Capital

6.3.1 Managed assets under Indonesian venture capitals are not well developed

The number of Indonesian venture capitals has been stagnant in recent years. According to P01, it was around 50 to 60 during the last few years. Although domestic venture capital had started to increase over the past five years, the assets managed only increased slightly from Rp1.7 trillion in January 2014 to Rp11.47 trillion in October 2018, an increase of more than Rp9 trillion (A$9m) within four years (P01). Since 2011/2012 domestic venture capital has become more significant, some venture capital' assets reached $80 million-100 million and started to leave early-stage funding (P09).

However, the availability of capital from Indonesian venture capital was considered limited. The main source of venture capital funding was still banks. P03 explained that:

> Yes, because the characteristic of funding is very limited. They do not have strong capital as foreign venture capitals have. Most of its capital comes from third parties such as banks or other capital sources.

Domestic venture capitals in Indonesia use money from banks or other financial institutions (P09) to channel into their business partners. Therefore, the two sources of domestic venture capital funds come from banks and shareholder capital, which are usually very limited (P03). Nevertheless, venture capitals do not raise funds from other sources, such as the public which makes their funds expensive (P09).

The existing regulation of venture capital is not effective in developing domestic venture capital and policies are not considered effective in increasing the asset volume of domestic venture capitals industry (P01). The Indonesian FSA issued regulation number 35 of 2015 to increase the number of assets managed by venture

capital. However, the policy to increase the venture fund was also not effective. P01 explained that:

> Venture fund is an investment contract such as a collective investment scheme with the minimum amount Rp1 billions of managed funds, and the maximum investors who can invest in each fund are 25 parties, and the objective of the fund is restricted according to the business of the venture capital.

In practice, most domestic venture capitals are not interested in this investment scheme and the scheme has not been able to increase the funds managed by the venture capital industry. One participant (P10) explained that his company had received the license to create a venture fund and in early 2018 they were at the fund-raising stage. Therefore, it remains to be seen whether the venture fund will improve the availability of funds for the domestic venture capital.

6.3.2 Liquidity constraint causes domestic venture capital to very selective provide funds for the businesses

There are three main business activities of Indonesian venture capitals - share participation/share ownership, convertible bonds, and financing of productive business activities. However, most venture capitals only provide productive business financing, a profit-sharing arrangement (P01). They did not choose share participation or ownership as their primary business since share participation is a long-term investment (P03) and the source of funds has to be more flexible than if using their funds for financing a productive business (P01). Therefore, the behaviour of the venture capitals was influenced by the limited source and cost of funds. They were more concerned about how to maintain liquidity in the short-term (P03).

In recent years, some venture capitals started to take equity participation in start-up companies. P09 explained that:

> … in our investment operation, we prefer mostly in participation, in the form of equity participation. We participate in a company; we take 10%, 20%, or even more than 50% if we pleased with our business partner. We are a little different from the other venture capitals, which prefer credit; we just don't like it. Our preference is to provide equity participation. … We have operated for three years and have invested in 10 business partners, ten start-ups, and this year we still have a plan to invest more.

Although domestic venture capitals now invest in start-ups, most of them do not provide seed funding. They may help the start-up at the incubator stage (P10); however, to avoid high risk, they only target start-ups which are ready for series A funding or above (P10 and P20). This was based on their experience over the last few years (P20). Many venture capitals preferred to invest in mature start-ups and joint others who have already been

investing in start-ups to share the risks of investment (P15). For example, when Astra [Astra International Tbk, an Indonesian public listing company] entered Gojek [an Indonesian unicorn start-up], it was in a mature stage investment, series D, or series E (P09).

In addition, some venture capitals were interested in or focus only on particular business such as fin-tech (P14). The parent company may influence the focus of venture capital. For example, if the parent company is a bank, the venture capital could only focus on fin-tech start-ups, as explained by P09:

> As a venture capital, our mandate and focus are to provide capital in the form of equity participation to the partner companies, in this context are start-ups, new businesses and especially fin-tech because we are a subsidiary of Mandiri Bank, 100% owned by Mandiri Bank.

6.3.3 Start-up companies had to compete to get funding from Indonesian venture capitals

Indonesian venture capitals were actively looking for investment opportunities in start-ups. One participant explained that around 60% of venture capital investment comes from the start-ups that actively approach them, while around 40% of the investment comes from the information of the other venture capitals (P09). In one funding campaign, P21 explained his experience of pitching for around 50 potential investors to try to get funding, and almost 20% of them were interested in the investment opportunity. However, in the end, the start-up only chose six of the investors to fund the start-up.

Some venture capitals created a specific division or branch or used their networks to help the start-up in the incubation stage. The purpose was to increase the level of the start-ups until they were ready for more significant investment from venture capital (P15). Mandiri Capital, for example, provides a website for the start-ups to register in the Mandiri Incubator program as one of its initiatives to assist the start-ups which are at the level of seed funding (P10).

6.3.4 Tax treatment discourages investors to invest in domestic venture capital

One venture capital participant (P11) explained that the tax treatment in Indonesia discouraged domestic investment in domestic venture capital. He explained that there was a tax disincentive that included a 25% tax for capital gains at the portfolio level, an income tax for the SPC (special purpose company) when venture capital uses a

SPC to invest in a start-up, and another tax for the venture capital income. Usually, venture capital uses an SPC when investing in a start-up. Therefore, there are three levels of taxable income when venture capital invests in a business partner company such as a start-up-the capital gains tax for investors, income tax for the SPC, and income tax for the venture capital. This is different from the tax treatment in Singapore where capital gains are not treated as taxable income (P11).

Some of the Indonesian domestic venture capitals, when investing in a start-up, establish a holding company in another country such as in Singapore. One start-up founder explained that the start-up had to establish a Singapore company as a requirement when they received the investment although he was not sure why (P14). He thought that one of the reasons was to escape the income tax requirement; otherwise, investors would not be interested. Since the start-up needed funds, they accepted the investment clauses which were determined by the venture capitals. The other explanation was that in the long term establishing a company in Singapore was strategic for the start-up if someday it expanded its operation regionally (P21). Another start-up founder (P21) described how:

> At that time, the form of investment was shares, which means that the shares eee we made it not in Indonesia, but in Singapore. Because for most start-up companies today, they are looking for the long-term, usually we want to expand regionally. So, from the investment aspect, the form of the investment was shares in a company in Singapore.

In addition, P21 also explained that:

> … usually during the pitching, the company has not been established. When the investment in Singapore entered, the company in Indonesia has not existed. Usually, if we look at the investment agreement, there are several provisions that we must do after the investment deal; otherwise, they can withdraw their investment. One of them is the establishment of a limited liability company. However, in contrast, the investors in the investment agreement must deposit their money to a certain amount. If this is not done, the investment can be considered null and void. These all are the provisions in the investment agreement.

The result was that the investors (venture capitals) put their investment in a company that resides in Singapore and acts as a holding company that owns the start-up company, which was established in Indonesia. The company in Indonesia was the operational company.

6.3.5 The presence of angel investors is a new phenomenon

The role of angel investors in Indonesia is underdeveloped (P15). Some participants believed that there were many angel investors as individual investors can become angel investors to provide initial capital (P20 and P15). Some have established

an association such as *Asosiasi Angel Investor Indonesia* (ANGIN or Angel Investment Network Indonesia)[786] (P07) and Endeavor Indonesia[787] (P09 and P15), to connect the interests of the angel investors and start-ups (P15). However, it should be noted that angel investors do not have the same level of interest, knowledge, and expertise (P15, P12). P15 also observed that although many Indonesian investors were ready to invest funds they had less experience in investing in start-up companies than foreign investors who have more experience in investing in digital areas.

Some participants reported that not all people knew angel investors (P04), and angel investors were unfamiliar to them, since they were not a regulated profession and 'not a standardized term in regulations' (P01, P06), and were quite newly introduced or socialized (P02). According to one participant; this was not strange since angel investors generally 'are rich people who do not want to be exposed', and they usually did their business quietly (P09). It can be concluded that for those people who have never done business with angel investors or tried to connect with them, the role of angel investors is unfamiliar.

6.3.6 Angel investors bring financial and non-financial support to start-ups

Despite the unpopularity of angel investors in Indonesia, some start-up companies have pursued funding from them to get capital and expect them to bring their networks to the start-ups (P19 and P20). The start-ups explained that they were willing to accept angel investors whom they expected to provide not only money but other resources (P19 and P16). For example, rather than provide money for start-ups, an angel investor offered his company's human resources and paid their salaries (P16). Other than that, it was expected that the angel investor would provide assistance about strategy (P20). When necessary, an angel investor might incubate a start-up, to help it prepare for the next investment round (P12).

6.3.7 Access to angel investors is increasingly available for start-ups

Access to angel investors in Indonesia is not perceived to be difficult. P14 explained that start-ups have many opportunities to access angel investors, to do pitching, and participate in competitions such as Thinkubator, Start-up Competition from the

[786] ANGIN was established in 2016. See ANGIN, 'Our Story' <https://www.angin.id/about-angin>.

[787] Endeavor Indonesia was established in 2012. See Endeavor Indonesia, 'Endeavor Mission', *About Us* <https://endeavorindonesia.org/mission/>.

Creative Economy Agency (*Badan Ekonomi Kreatif*/BEKRAF),[788] and The NextDev, talent scouting from Telkom Indonesia [789]. They also have the opportunity to connect with angel investors through their network, mainly to discuss the business and to do pitching (P14). Media exposure to a start-up helps raise interest in angel investors or friends interested in the start-up (P14). Therefore, the connection between start-ups and angel investors works both ways.

Table 6.2: Theme and subthemes related to the availability of capital from domestic angel investor and venture capital

No	Subthemes	ID
1	Managed assets under Indonesian venture capitals are not well developed	P01, P03, P09, P10,
2	Liquidity constraint causes domestic venture capital to very selective provide funds for the businesses	P01, P03, P09, P10, P14, P15, P20,
3	Start-up companies had to compete to get funding from Indonesia venture capital	P09, P10, P15, P21
4	Tax treatment discourages investors from investing in domestic venture capital	P11, P14, P21
5	The presence of Angel investors is a new phenomenon	P01, P02, P4, P06, P07, P09, P12, P15, P20
6	Angel investors bring financial and non-financial support to start-ups	P12, P16, P19, P20
7	Access to angel investors is increasingly available for start-ups	P14

6.4 The Role of Foreign Angel Investor and Venture Capital in Indonesia

6.4.1 Many foreign angel investors and foreign venture capitals entered the Indonesian market

Many foreign venture capitals have entered the Indonesian market (P20), such as Genesia from Japan, Jungle Ventures Group from Singapore (P21), Venox, and Alpha JWV, and some other venture capitals from Silicon Valley. It is common for foreign angel

[788] See Bekraf, '"Live Pitching Show" Dalam Acara Program Thinkubator Startup Competition [Live Pitching Show in the Thinkubator Startup Competition Program]' <https://www.bekraf.go.id/galeri/detail/live-pitching-show-dalam-acara-program-thinkubator-startup-competition>.

[789] See The NextDev, 'Talent Scouting' <https://thenextdev.id/scouting/>.

investors and venture capitals to collaborate with domestic angel investors and venture capitals to form syndicates or joint investments (P21 and P07), especially if the investment value reach tens of million dollars, since they use it 'as hedging for risk management' (P07). P19 explained that these foreign venture capitals and angel investors enter the Indonesian market because, in terms of the digital market, it is a developing country whereas developed countries have low economic growth and their digital market has settled. In contrast, Indonesia has a large gap in terms of digital literacy and has a huge population.

6.4.2 Foreign venture capitals are more expert and experienced about investment in start-ups

Several participants perceived that foreign venture capitals were more expert when making investment decisions in Indonesian start-ups (P01, P15, P20). They had more expertise, competencies, and proficiency (P01). Moreover, they know what products work in their country and what will work in Indonesia since their countries of origin, such as the US or China, are ahead of Indonesia. Therefore, they have the courage to do the same thing in Indonesia (P15). Foreign venture capitals have a major influence on the Indonesian ecosystem since 'they have known how the game played' and have been profitable in their country, such as the US. A few years ago, most digital ecosystem start-ups in Indonesia were still conventional (P20). P21 said that from the experience of other countries such as China, investors could see the next wave of trends in the digital start-ups' industry: e-commerce, fin-tech, and then insur-tech.

6.4.3 Regulations concerning foreign venture capitals were very open to their investment activities in Indonesia

One participant believed that the involvement of foreign venture capitals and angel investors in equity participation in many Indonesian companies brought positive impacts, especially in fulfilling the need for capital for many start-ups (P01). The current regulation did not significantly prohibit foreign venture capital activities. In general, the only limitation in their investing in start-ups comes from the Investments Law[790] administered by the Investment Capital Coordinating Board (*Badan Koordinasi Penanaman Modal*/BKPM) (P01). As long as the business is not on the negative investment list (*Daftar Negatif Investasi*) from the BKPM, foreigners can be shareholders of a company in Indonesia. The other limitation of foreign ownership in a company comes

[790] *Undang-undang No. 25 Tahun 2007 tentang Penanaman Modal [Law No. 25 of 2007 on Investments]* (Indonesia).

from sectoral laws and operational regulations (P02). For example, in the Banking Law, the Insurance Law and the Capital Market Law, foreign ownership is limited when foreigners intend to invest directly as a shareholder in a bank, insurance company, or securities company.

P01 explained that since any foreign companies or citizens can invest in Indonesian companies, within the above-explained limitations, basically the law does not prohibit foreign venture capital from equity participation in Indonesian start-ups. Although there are provisions from the FSA regulation which require anyone who conducts venture capital activities to apply for a license from the FSA, it is not entirely clear whether any violation of these provision by foreign venture capital can be sanctioned under the current regulatory framework, because the current FSA regulation is only applicable to domestic players.

Table 6.3: Theme and subthemes related to the Role of Foreign Angel Investors and Foreign Venture Capital in Indonesia

No	Subthemes	ID
1	Many foreign angel Investors and venture capitals entered the Indonesian market	P07, P20, P21
2	Foreign venture capitals were more expert and had more experience in investment in start-ups	P01, P15, P20
3	Regulations concerning foreign venture capitals were very open to their investment activities in Indonesia	P01, P02

6.5 Available Sources of Funding for Start-Ups in Indonesia

6.5.1 Banks are not the option of funding for start-ups

Almost all of the start-up participants explained that the use of debt as a source of capital was not their preferred option. P20 stated that lending from a bank or other sources was a mistake because the business of a start-up was high risk, but P2P lending could be used for a short-term solution. A similar view was expressed by P15. He said that any loan from a bank or other source was not an interesting option because while start-ups have to return the loan, the start-up itself is a high-risk business and actually can fail. For P16, lending from a bank was not attractive because of the obligation to pay interest. Similarly, P18 said that borrowing money from a bank would be a problem and

a burden in the future, since the start-up had to return the principal and interest on the loan, and interest from the bank was too high for his start-up business.

Several participants perceived that the banks were not an accessible source of funding for start-ups because there were many requirements to apply for loans from banks, which the start-ups were unable to meet as most did not have collateral or a track record as their balance sheet may only go back for a few years (P09, P02, P13, P12, and P19). P09 stated that:

> Traditional banks may be not suitable for start-ups because most of them do not have collateral, not profitable, and their track record is new; their balance sheet may have been just started less than a year, not yet 3 or 5 years.

Many start-ups were operated by younger generations who had just started their businesses, and although they lacked the financial history needed to apply for a loan from the banks, many were innovative and had potential (P08). In Indonesia, the bank assesses the 5Cs before approving a loan proposal: the capital, collateral, character, condition of the economy, and the borrower's capacity, which start-ups are usually unable to meet (P06). Even if the start-up thinks it has assets such as digital products, the banks rarely recognize these assets. Thus, the perspective of the banks and start-ups is different (P17). For example, P17 had tried to approach a bank unsuccessfully and found that banks considered the digital products of a start-ups were not worth funding. P19 also thought that access to bank finance was challenging because of bank regulations which required collateral to borrow money. While P21 thought banks may be an option, he reported that most start-ups used self-financing.

6.5.2 P2P lending is not an alternative for funding for most start-ups

Some start-up participants did not see P2P lending as a viable source of funding. P15 said it was not suitable because the risk of failure was too high. Therefore, the lender's money could be unexpectedly lost.

On the other hand, P20 explained that P2P not the best solution for long-term funding, especially for digital start-ups, depending on the type and volume of the business. For P17, the amount that could be borrowed was too low, but for P19 and P2P it was an interesting instrument that could be used.

6.5.3 Angel investors and venture capitals

Hence, the available sources of funds for start-ups in Indonesia are angel investors and venture capitals. P04 and P10 explained that start-ups seek seed funding

from angel investors and then enter venture capital investment. P07 reported that many start-ups have already obtained investment from an early stage. However, some other participants (P14 and P21) explained that based on their experience, it was common to pitch and obtain funding from angel investors and venture capital at the same time. For P16, P19, P14, and P18, combining external funding sources from angel investors and venture capital was strategic. However, there were slightly different views from participants about the amount of funding they could get from angel investors and venture capital.

However, not all start-ups had good results. P16 found that sometimes the promise from angel investors was different in reality. He had already signed a deal with an angel investor who only provided 20% of the amount which had been agreed. The deal was abandoned because the funding did not cover the start-up's operational expenses. P14 said that although he had participated in many competitions, won a start-up world cup in the US, and pitched in front of many potential investors including incubators, some of whom were angel investors and venture capitals, his start-up could not obtain funding. He suspected that not many investors were interested in the areas of retail and hospitality.

Other participants had different views. P19 explained that the ecosystem for start-ups funding in Indonesia was very dynamics and the network for funding was always available. However, not all start-ups could obtain funding from investors; but if they failed they could easily make proposals to other investors. For P20, although access to funding was available from angel investors and venture capitals, the Indonesian start-ups' ecosystem was changing. While in the past few years, many investors were willing to invest in new start-ups, it was now relatively difficult, especially for graduate students, to obtain funding. P07 said the reason investors were in a wait-and-see situation was that new start-ups were now too similar, compared to around 2010s when there were few start-up ideas such as Gojek [an Indonesian unicorn start-up].

6.5.4 Stages of funding for start-ups in Indonesia

Funding in Indonesia starts with the entrepreneurs' capital which comes from their savings or accumulation of capital gain from previous companies (P18). In some instances, entrepreneurs devote their skills and time to developing digital products and start to market them in a small-scale market (P17 and P18). After that, they can obtain funding from their families and friends (P15). Angel investors are the next source of capital. In Indonesia, they might be the entrepreneurs' former boss or their seniors who

have more money (P15). After the start-up is mature, the next stage is venture capital funding (P15) with series A, series B, and series C funding (P22).

Participants had slightly different views about the amount of funding from angel investors and venture capital. P11 stated that the angel investors could provide funding of around Rp500 million (A$51,000) to Rp2 billion (A$207,000). P22 reported that the amount was around Rp500 million (A$51,000) to Rp1.4 billion (A$145,000), while P04 explained it was between US$100,000 to US$1 million and P07 around Rp600 million (A$62,000) to Rp3 billion (A$310,000), pre-series ranged between Rp3 billion (A$310,000) to Rp10 billion (A$1 million), and series A started from Rp10 billion (A$1 million)). P09 described series A is between US$2 million (A$2.9 million) and US$5 million (A$7.2 million).

Table 6.4: Amount of funding for start-up from angel investors and venture capitals

No	Angel Investors/seed funding	Venture capitals funding	Participant
1	Rp500 million (A$50,000)-Rp2 billion (A$200,000)	Start from Rp2 billion (A$200,000)	P11
2	Rp500 million (A$50,000) to Rp1.4 billion (A$140,000)	Start from Rp1.4 billion (A$140,000)	P22
3	US$100,000 (Rp 1,4 billion or A$140,000) to US$1 million (Rp14 billion or A$1,400,000)	Start from US$1 million ((Rp14 billion or A$1,400,000)	P04
4	Rp600 million (A$60,000) to Rp3 billion (A$300,000)	Start from Rp3 billion (A$300,000)	P07
5	Less than US$2 million (A$2.9 million)	Between US$2 million (A$2.9 million) and US$5 million (A$7.2 million)	P09
6	RP100 million to Rp10 billion (A$10,000)	Start from Rp10 billion (A$1,000,000)	P20

Table 6.5: Theme and subthemes related to the available sources of funding for start-ups in Indonesia

No	Subthemes	ID
1	Banks are not the option of funding for start-ups	P02, P06, P08, P09, P12, P13, P14, P15, P16, P17, P18, P19, P20, P21
2	P2P lending is not an alternative for funding for most start-ups	P15, P17, P19, P20
3	Angel investors and Venture Capitals	P04, P10, P07, P14, P16, P18, P19, P21
4	Stages of funding for start-ups in Indonesia	P04, P07, P09, P11, P15, P17, P18, P20, P22

6.6 Different Perspectives on the Role of Equity Crowdfunding

6.6.1 Limitation of equity crowdfunding offering amount in regulation may not interesting for certain types of start-ups

The Indonesian FSA regulation states that the maximum amount an issuer can obtain from the equity crowdfunding offering is Rp10 billion (around A$1 million) in one year. But the opinions of start-up participants about the maximum funding in one year from equity crowdfunding varied because start-up companies may have different amounts of funding for the seed, start-up and expansion stages. Rp10 billion (A$1 million) was considered sufficient for new businesses (P15 and P08), and the limitation should also consider a precautious step because if the new businesses collapse, it will hurt people's confidence (P08). P21 explained that some start-ups rely on capital but others rely on human resources. P14 noted that for some start-ups, the amount of Rp10 billion for seed capital might be small but depended on the scale of the companies and the industry; for example, for an IT company that needed to buy physical instruments such as hardware the amount was not much. P16, the founder of IT companies which relied heavily on using servers, agreed that the amount was too low. However, P19 the CEO of a digital start-up company considered Rp10 billion could be used for development or at the level of series A, and P10 also said that it may not apply to all sectors. P18 argued that whether the amount is sufficient for the seed-stage depended on the type of the start-up and it would be adequate for new start-up companies.

Some other start-up participants said they could use this amount until the expansion stage. As P09 explained:

> In my opinion, since there are differences in the industry, such as for a restaurant, the Rp10 billion amount is quite significant, but for fintech, which needs a platform, applications and programmers for development and et cetera, maybe Rp10 billion is not enough.

For P20, Rp10 billion would be used only for the production stage, but not for stage two, the market fit, and stage three, the scaling. Equity crowdfunding is only enough for stage one.

Nonetheless, although some participants (P16, P15) considered Rp10 billion was too low, they thought that start-ups could still use equity crowdfunding, but needed to obtain capital from other sources such as angel investors or venture capitals. Therefore, Rp10 billion is still relevant for seed funding. P22 said that Rp 10 billion was worth a try at the moment, although he expected the FSA can relax the maximum amount of funding from equity crowdfunding.

6.6.2 Equity crowdfunding can be combined with other sources of funding

Angel investors and venture capitals have their own sources of funding and equity crowdfunding can be combined with them. While angel investors are suitable for seed funding and venture capitals for the next stage, the extent to which equity crowdfunding can be used with these sources depends on how the regulation sets its fundraising limit (P10). Some participants argued that using equity crowdfunding with other sources of funding does not have to follow a pre-determined path (P16, P12, P19, P04, P06, and P08). P12 suggested that it should depend on the needs of the start-up. For example, if the start-up from equity crowdfunding can jump to one level, the combination of funding can be used to jump to another level. Based on his experience, sometimes when a start-up offered an investment opportunity, an angel investor might only be able to provide 10% of the funding needed. The start-up then had to find another source of funding. In this instance, equity crowdfunding can accelerate the start-up because inadequate funding constrains start-up capacity. P19 whose focus was business to business (B2B) services, preferred equity crowdfunding angel investors rather than venture capital.

P11, on the other hand, believed that RP10 billion from equity crowdfunding was ideal and relevant to the other stages of funding, such as angel investors, venture capital, and the IPO. If the start-up has already obtained funding from angel investors or

venture capitals, this can influence its decision to use equity crowdfunding. P14 explained that sometimes an angel investor wanted to maintain control of the start-up:

> Maybe they do not hold the majority shares, but they can have multiple voting rights from the numbers of shares they hold. This are also the clauses which have to be considered too since they can ... they do not intend to make a big profit, but they want to control the company.

P09 had a different perspective. He considered that equity crowdfunding was suitable for start-ups which already had significant traction, and the company's valuation was clear. If the company was still in the seed stage, it would be challenging to do the valuation. Moreover, if it is very young, the valuation might be too low. He suggested that the start-up should wait until the valuation was higher and then it can issue shares through equity crowdfunding.

6.6.3 Equity crowdfunding can complement venture capital and angel investor

Many participants perceived that equity crowdfunding could complement venture capital. P01 explained that depending on the stages of funding and the market where venture capital was focused, equity crowdfunding could complement venture capital and take the start-ups to a higher level. Moreover, as long as a rule provided the maximum limitation, equity crowdfunding match venture capital funding. However, now there were not many venture capitals willing to invest in seed funding; they entered series A investment or above (P20). Therefore, start-ups have to find seed funding from angel investors (P20). P01 believed that equity crowdfunding could also be a competitor for venture capital if it had the same market segment as equity crowdfunding.

P10 had a different perspective, arguing that venture capital could use equity crowdfunding as an exit strategy through its secondary market. Similarly, P22 explained that equity crowdfunding could improve the liquidity of venture capital.

Some participants perceived that equity crowdfunding could be complementary to angel investor funding (P02). P20 explained that while not many venture capitals in Indonesia were willing to enter seed funding, start-ups had limited options for obtaining funding, especially from angel investors who have much money. P12 observed that not all start-ups had the ability to approach investors or the networks to connect with them; therefore, equity crowdfunding broadened the opportunity for start-ups to obtain funding. P04 agreed. He believed that since not all people know angel investors and venture capitals, equity crowdfunding can provide access to funding from

these people and can provide an alternative when the funding from angel investors and venture capitals dries up.

While for P03 equity crowdfunding would act as the bridging between seed funding by the angel investors and venture capital, P11 argued that given the limitation of Rp10 billion, equity crowdfunding was suitable for seed and early capital funding. P10 had a different point of view, saying that equity crowdfunding could provide a new means for angel investors which was more uncomplicated and comfortable because another party would help them do the due diligence.

6.6.4 Equity crowdfunding may cause regulatory arbitrage within the financial regulatory area

P06 expressed concern about more relaxed regulatory areas in equity crowdfunding, compared other funders such as banks. He explained that while banks have stricter regulations, other regulations were more relaxed. There was not a level playing field between banks and equity crowdfunding which could cause banks to lose business, as happened when the public established micro-financial institutions after the law concerning these institutions was issued. He suggested that there should be a limit on access to equity crowdfunding and only be applicable to specific areas with different market segments to banks.

Table 6.6: Theme and subthemes related to the different perspectives on the role of equity crowdfunding

No	Subthemes	ID
1	Limitation of equity crowdfunding amount in regulation may not interesting for certain types of start-ups	P08, P09, P10, P14, P15, P16, P18, P19, P20, P21, P22
2	Equity crowdfunding can be combined with other sources of funding	P04, P06, P08, P10, P11, P12, P16, P19
3	Equity crowdfunding can complement venture capital and angel investors	P01, P02, P03, P04, P10, P11, P12, P20, P22
4	Equity crowdfunding may cause regulatory arbitrage within the financial regulatory area	P06

6.7 Disclosed Information to Reduce Information Asymmetry in Equity Crowdfunding

6.7.1 Information asymmetry is always present

One participant believed that information asymmetry was always present, regardless of the media, and whether a platform used technology or was more conventional (P02). The effect of information asymmetry in equity crowdfunding, according to several participants, was undesirable. P01 was concerned about the impact of information asymmetry on potential risk. Inaccurate information about a company seeking equity crowdfunding leads to the possibility that all the potential risks will not be revealed especially if the information is substantial (P01). Additionally, when asymmetrical information is present and there is a significant barrier to accessing it, this condition can increase the valuation (P01).

6.7.2 Information is valuable for the start-ups

There was an implicit assumption that information was perceived as valuable for a start-up. '… the one who owns the information does not easily give it to others' (P15). For this participant it was 'about the money, information becomes the value', and that start-ups have their own way of choosing to which of the opportunities that come to them they will respond (P15). Another participant explained that since information becomes public consumption, some might be too sensitive to be disclosed (P14). He explained that information such as the market, the developmental team, and monthly expenditure could reveal the strength of the start-up to competitors. For example, if the competitor could calculate the salary of the developmental team based on monthly expenditure, the competitor could offer a higher salary and hijack the team. The level of awareness to provide information is not similar among start-ups or SMEs. A government official expressed the view that the level of awareness of reporting in small companies was not as high as for medium or big companies, although this could be improved by law enforcement (P01).

6.7.3 The background of the founders and the team

Almost half the participants explained that investors need to know who the founders of the start-ups are as this will determine the continuity of the business and if it might change in the future (P15). The track record of a start-up's founders is a measure of whether or not the business may fail or succeed. P15 said:

> There are [investment] opportunity and the founders, and whether they have succeeded, ever failed or what their experience is, and then why they want to do this, why they think that this is the right thing to do and how they want to implement the strategies.

Likewise, another participant (P17) said that while anyone could establish a start-up, but the integrity and experience of the founders would be observed to judge if they 'are serious, consistent, and disciplined'.

For some participants, the background of the founders was crucial and would determine whether or not the idea could be executed (P20 and P22), as one participant (P20) illustrated:

> For example, if A wants to make a company, such as a food company, he put a business plan. Also, there is B, and B is Bondan Winarno [a famous Indonesian chef], also put a business plan, also the same food. What would people choose? … The people are an absolute element.

A start-up CEO (P21) described his first investment for his company when it was still at the ideas level; the investors conducted the due diligence based purely on the background of the founders. He explained that:

> For the first investment, we did not have a company. So, the due diligence can be done purely on the founders, what was the background of the founders, and more on the understanding of the synergy and the vision of each founder, whether suitable for the need of the business development. .... It often happens that we have to understand the synergy between the co-founders and whether each one can contribute to the development of the business. It can be said that we were lucky that our investors saw this synergy between myself and the co-founder."

P07 also reported that most investors tend to be interested in the founders' background, where were they graduated from, and also how they complemented each other.

> … for example, if the founders are programmers, how they will work without a businessperson, and vice versa. If all the founders come from the business, how can it work without a person from the IT. It should be seen how the composition complements each other.

However, P18 had a different view. Although the founders of a start-up were essential, especially their personal branding, it was less important than information about the product and the market.

Several participants explained that it was essential the people involved in the start-up were disclosed to prevent someone who has a poor track record, such as being involved in cybercrime, getting involved in a start-up. Therefore, the start-up should explain 'who is the IT person, the developer, the programmer, and the CEO' (P12). Conversely, P14 said that while the core of the team was vital information, it does not

need to disclose the organization's details, since 'competitors may know what our strength is'; for example, how many people were in the development or sales team. If competitors could calculate monthly expenditure and the number of employees, then they could use it for their interests. P14 explained that:

> Maybe it is also sensitive about the monthly expenditure. For example, if I said the team's number is 30 with the monthly cost of Rp300 million. This means that the competitors can know that the average salary is Rp10 million, and they can offer a higher salary, such as Rp15 million, which will be more interesting. If there are competitors, it will be more sensitive to be open about the cost and the capital.

6.7.4 The business plan, the market and the product

Almost half of the participants believed that investors needed information about the business plan of a start-up to make an investment decision. Several (P08, P20, and P16) thought that a business plan was vital information to be disclosed, and the only information needed by investors.

For other participants, although a business plan was important information, it was still an abstract description and even 'still too generic to supervise'; the investor still needed help to understand the business plan (P10). Another participant (P04) suggested it is just like a simpler prospectus for potential investors and must include detailed information concerning: "... the amount of fund raised, business models, description of the market, dividend policy, exit strategy, team management profile, capital structures, and financial highlight".

Almost half the participants also mentioned that the market was an important consideration when potential investors made an investment decision in a start-up. However, they had different views on information about the market. For P17, a start-up was ready to be offered to investors if it already had the product and the market, although it did not need to be well developed. P18 said the market share of the start-up should be obvious and based on data rather than assumptions.

Other participants said it was sufficient if the start-up explained its market (P14), market strategy or description of the market (P04, P21), marketing aspect (P22), or even potential market size (P07). However, for P14, market information was confidential since another start-up could copy its market strategy.

Many participants viewed a start-up product as critical information when making an investment decision but had different opinions about how to describe it. P15 argued there must be a prototype, while P17 explained that the start-up product must be

quite useful and ready to be marketed; there would be no more development costs, only production costs. Other participants said that the investor needed information about the start-up product (P18, P20), or whether or not it exists and already had users (P19). One participant explained that the product's information was important to gauge if a similar product was available, and if so the difference between the start-up and existing product. If this was a new product, it might not yet have been proven (P07).

6.7.5 The financial condition and financial projection

Some participants believed that financial condition should be disclosed for potential investors. They used several terms to express financial condition: 'the financial health'(P14), 'the financial aspect' (P22), 'financial highlight' (P04), and 'financial report' (P18 and P06). P18 argued that investors need to know the condition and potential of a company, so that their expectations matched the company and were not too high. While P14, mentioned financial reports or conditions should be disclosed, the current capital of a start-up is sensitive information.

Several participants considered that financial projection should be essential information available to potential investors. P15 explained it was vital when a start-up was pitching, 'what they want to do, and whether the people can do what they want to do'. P21 also regarded financial projection as important, especially when the founders were beginning the business. Therefore, a financial projection complements how the business model can get future revenue and develop the market strategy. P09 thought that ideally potential investors should be informed about the 'forward projection and the benchmarking from the competitor'.

6.7.6 The network and other existing investors approached

A start-up network is usually something that potential investors ask when they make an investment decision. One participant (P15) stated that information concerning investment opportunity and networks of the start-up who can recommend it could increase potential investor confidence. They may also consider who are the other investors in a start-up. For venture capitals, a good reputation means that they often do investment deals from other venture capitals (P09). This synergy is one consideration when making an investment decision in a start-up. As P21 explained:

> At the end of the day, investors worked as one team. If they saw that the venture capital who joined the consortium was not good, maybe this automatically affected their decision [and they were] not interested in investing. And luckily, our three investors have quite a good reputation. That was the reason we can attract many more investors.

6.7.7 The idea

Participants thought it was important to consider the idea. P17 explained that the start-up had to be clear about 'what is the problem that they want to solve', and how it affected society. It had to explain to potential investors the problem, the solution, and the market strategy (P17).

6.7.8 The risk

Disclosure of risk in investment in a start-up is important. P17 believed that the description of the risk would help people to understand more about it. However, P06 asserted that even if the risk was disclosed, it should be ascertained whether or not potential investors read and understood it.

6.7.9 Information updates

Updates on information regarding the start-up also influence the decision of potential investors. One participant described a discussion forum in a foreign equity crowdfunding platform that provided updates about cooperation between the start-up and third parties, including licenses (P11). Another (P18) said that it was essential to know any issues concerning a start-up, including the direction of and news about the start-up.

6.7.10 Regulation determines the guideline of minimum information to be disclosed

P02 suggested that although the FSA did not guarantee that prospectus information was correct, the regulator should identify the minimum information and determine a minimum standard. For example, the FSA could provide a guideline by publishing a simple prospectus for a start-up company. Similarly, P04 thought that the regulation should state which information about the business was required, but it was sufficient if it required only the most important information, such as the business plan, and the purpose of the fundraising, to be disclosed.

6.7.11 Displayed information should be simple and easily accessed

P02 explained that information about start-ups for the potential investors should be presented simply. Therefore, the content should be simplified and be easily accessible using current technology. Later, more detailed information should be accessible through links or attachments.

6.7.12 Principle-based disclosure is preferable to detailed rules

One of the concerns about information asymmetry, according to P02, was that it was difficult to identify information that should be disclosed because not all companies

were honest enough to disclose it. He suggested that principle-based regulation should be applied as had been used in almost all capital markets, including in Indonesia. Therefore, the company was expected to openly disclose information that was necessary, material, and which will impact on the company as a going concern.

6.7.13 Accountability of platforms about the accuracy of information

Some participants expressed concern about how the regulation could prevent equity crowdfunding being used as a scamming investment scheme by pretending to use a start-up. However, the start-up is designed to fail after it obtains funds from the public (P15 and P12). There was also concern about who would be responsible for the content of information in a campaign (P06), and whether the platform was the agent of the company and could create or assist the campaign of the issuers (P06).

Although equity crowdfunding regulation states that the platform and the issuers are individually and jointly responsible for the information in equity crowdfunding, some participants did not think this was a fair division of responsibility. P04 believed that the platform could not be accountable for absolute liability. Instead, it should refer to the extent to which the platform had fulfilled its liability to review the proposals put to it. It is possible that the platform could be the victim of false information from the issuers. However, if it has fulfilled its duties, then it cannot be held responsible. He suggested the introduction of rules to determine the duties of the platform. There should be evidence of negligence for a platform to be liable in relation to misleading information.

P05 explained that the platform was responsible for any document submitted to it. If the platform could prove that it was not involved in this matter, it would not be liable, similar to the rules in a common IPO. He said that one of the indicators was if the platform was suspicious about accuracy of information, but took no action, it would be liable. However, if the platform does not know about the inaccuracy, it would be free from liability.

P10 said that logically, since the start-up was the one seeking funding, it should be responsible for any document submitted to the equity crowdfunding platform. There should be rules to protect investors concerning this matter. P04 had the same view and explained that the issuers should ascertain the accuracy of the information concerning the start-up.

Table 6.7: Theme and subthemes related to the disclosed information to reduce information asymmetry

No	Subthemes	ID
1	Information asymmetry is always present	P01, P02
2	Information is valuable for the start-ups	P14, P15, P01
3	The background of the founders and the team	P07, P12, P14, P15, P17, P18, P20, P21, P22
4	The business plan, the market and the product	P04, P07, P08, P10, P14, P15, P16, P17, P19, P18, P20, P22
5	The financial condition and the financial projection	P04, P06, P09, P14, P15, P18, P21, P22
6	The network and other existing investors approached	P09, P15, P21
7	The idea	P17
8	The risk	P06, P17
9	Information updates	P11, P18
10	Regulation determines the guideline of minimum information to be disclosed	P02, P04
11	Displayed information should be simple and easily accessed	P02
12	Principle-based disclosure is preferable to detailed rules	P02
13	Accountability of the platforms about the accuracy of information	P05, P06, P10, P12, P15,

6.8 Regulation Should Address Risk of Fraud from Scamming, Use of Funds and False Documentation

6.8.1 Risk of the use of start-ups for scamming in equity crowdfunding

One of the problems in equity crowdfunding is uncertainty about whether a start-up was created and operated sustainably or for the purpose of scamming. P12 said there were many start-ups which were created with bad intentions to obtain funding, and afterwards the founders used the money for their personal interests. In the end, the start-ups failed and the founders gave many reasons for its failure. The people behind the start-ups then made a new start-up. P12 suggested that the regulation and the authorities must

ensure that start-ups which want to access equity crowdfunding are legal. P15 expressed the same concern:

> The problem is who will provide a guarantee that the start-up is made for real, the intention is to succeed, or incidentally it is just created to obtain funding from the public, and after the fund is obtained, then the start-up is closed.

He added that it was critical to prevent equity crowdfunding being used as an instrument of investment scams by pretending to create a start-up, but in reality, it would fail.

P16 suggested it was possible to differentiate whether a start-up was genuine or scamming by knowing the people behind it or the key persons and network around it.

6.8.2 Risk of fraud concerning the use of funds

There was a risk of fraud concerning the use of equity crowdfunding funds after its campaign is over. P01 explained there was a possibility that the issuers did not use the funds as has promised. P03 added that people would do anything, even claim that they were broke or disappear and never be found after they obtained funds from equity crowdfunding where the issuers and investors never meet.

P06 was also concerned about the use of funds obtained from equity crowdfunding. Based on his experience as a contributor in donation crowdfunding, he said that contributors cannot control the use of money in donation crowdfunding, and they do not know how much money has been used as promised or how much has been used for personal interests. He gave an example of a famous case in the media of a person called Cak B [not a real name] who became popular but was suspected of using the donation money for his own interests. Cak B claimed that personal belongings such as his mobile phone and a luxurious car were for operational activities. P06 believed that this could happen either in donation or equity crowdfunding.

6.8.3 Risk of fraud concerning the documents in crowdfunding

The risk of fraud in equity crowdfunding, according to P03, was high because instead of face-to-face meetings and paper-based documents, in crowdfunding everything is based on IT (information technology). Therefore, the level of supervision needs to be increased, since everything is just information and vulnerable to fraud.

Table 6.8: Theme and subthemes related to the regulation should address risk of fraud from scamming, use of funds and false documentation

No	Subthemes	ID
1	Risk of the use of start-ups for scamming in equity crowdfunding	P12, P15, P16
2	Risk of fraud concerning the use of funds	P01, P03, P06
3	Risk of fraud concerning the documents in crowdfunding	P03

Chapter 7 : Comparative Law Analysis

7.1 Introduction

This study examines the functional comparability of differences and similarities of solutions to the problem in selected jurisdictions which are suitable for the micro-comparison.[791] Therefore, the focus is not only on similarities or differences, but also on finding 'similarities among different' and the 'differences and divergences among similar', so as to increase an understanding of how the regulations from different countries respond to and/or solve similar problems of equity crowdfunding regulation.[792]

This chapter discusses several aspects of equity crowdfunding regulation relevant to this thesis. The approach combines sources from academic literature, such as law journals, and compares regulation in the US, Australia, and Indonesia. The combination of academic research and public policy can broaden how we view equity crowdfunding regulation. In this chapter the discussion of regulation in the US and Australia is often more extensive than of Indonesia because the literature about equity crowdfunding regulation is more mature in the US and Australia than in Indonesia. It can be difficult to compare the functionality of regulations since some aspects may apply in the US or in Australia, but not in Indonesia.

Based on the legal transplant literature and comparative law, this thesis has argued quite extensively that legal origin does matter, but transplanting laws from more successful countries has been suggested by the World Bank is a more effective option, although there are challenges in transplanting laws from different legal system.[793] This thesis chooses Australia and the US as the source of comparison because both countries are among the first to regulate equity crowdfunding. In addition, the focus of this thesis is to learn more from both countries specific issues in-depth which has been identified as potentially cause the equity crowdfunding regulation in Indonesia ineffective in the implementation stage and use the sources from micro comparison view to suggest changes to those specific issues in the Indonesian equity crowdfunding regulation.

The following aspects of equity crowdfunding law will be compared and discussed in detail in this chapter:

[791] Örücü (n 779) 30.
[792] Ibid 34.
[793] See para 2.11.

- equity crowdfunding offering prior to equity crowdfunding regulation;
- limitations for companies in accessing equity crowdfunding;
- requirements of equity crowdfunding investors;
- required information for potential investors in equity crowdfunding offerings;
- standards of disclosure for equity crowdfunding and concerns about fraud;
- regulatory requirements perceived to be costly; and
- the conduct of equity crowdfunding platforms in checking equity crowdfunding offering documents.

7.2 Equity Crowdfunding Offering Prior to Equity Crowdfunding Regulation

7.2.1 The US

Prior to the Jumpstart Our Business Start-ups (JOBS) Act, equity crowdfunding could not be offered to the general public without filing a registration statement. *The Securities Act of 1933* requires any offering or sales of securities to be registered with the Securities and Exchange Commission (SEC),[794] which is considered expensive.[795] There are several exemptions for certain types of offering that may relieve the issuer of securities of some or all requirements of registration;[796] however, exemptions from registration for securities crowdfunding offerings were not available.[797]

In April 2012, the JOBS Act was enacted.[798] It is primarily intended to regulate equity crowdfunding by relaxing some provisions in the *Securities Act of 1933* concerning the sale and offering of securities,[799] thus making securities public offering easier for many small companies while enabling issuers to avoid the status of a public company and its reporting requirements.[800] Title II of the JOBS Act provides an option for companies to offer an unlimited amount of fundraising through crowdfunding, but

[794] Frank Vargas, Jennifer Dasari and Michael Vargas, 'Understanding Crowdfunding: The SEC's New Crowdfunding Rules and the Universe of Public Fund-raising' (2015) *Business Law Today* 1, 1; *The Securities Act of 1933*, 15 USC s 5. The US SEC is an agency that supervises and regulates the securities industry. Its mission is to 'protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation'. See The US Securities and Exchange Commission, 'What We Do', *About SEC* <https://www.sec.gov/Article/whatwedo.html>.

[795] Bradford (n 38) 30.

[796] Timothy M. Joyce, '1000 Days Late & $1 Million Short: The Rise and Rise of Intrastate Equity Crowdfunding' (2017) 18 *Minnesota Journal of Law, Science and Technology* 343, 349.

[797] Joan MacLeod Heminway, 'Crowdfunding and the Public/Private Divide in U.S. Securities Regulation' (2014) 83 *University of Cincinnati Law Review* 477, 478.

[798] Agrawal, Catalini and Goldfarb (n 94) 64.

[799] Ibid 64.

[800] Heminway (n 798) 580; See also *The Securities Act of 1933* (n 794) § 4(a)(6); Vargas, Dasari and Vargas (n 794) 1.

only for high-net-worth (accredited) investors, while title III, which adds Section 4(a)(6) of *the Securities Act*, creates options for companies to use crowdfunding to offer securities to any investors regardless of their income.[801]

Although SMEs had several alternatives for raising funds before the *JOBS Act*, most had not been attractive for start-up companies. One example is an exemption of securities offering registration under Regulation A, that allows companies to offer or sell securities up to US$50 million to accredited or unaccredited investors with certain investment limitations.[802] However, the cost of meeting the initial regulatory requirements of Regulation A and on-going annual reporting obligations is hundreds of thousands of dollars, which is not viable for most start-ups.[803]

The other example is private placement offerings which are regulated under the complementary Section 4(a)(2) of the *Securities Act of 1933* and the 'safe harbour' Rule 506 of Regulation D. Private placement can be used for unlimited fundraising, while its advertising and solicitation are disqualified from the requirement to file registration. A private placement memorandum is required to avoid potential claims of fraud. This is considered a cheaper option than the requirement to disclose documents under Regulation A.[804] However, selling and offering under this rule is available for an unlimited number of accredited investors and up to thirty-five 'sophisticated investors'.[805] The issuer must provide a disclosure document that is essentially comparable with documents used in the registered offering, if offered to non-accredited investors.[806] The weaknesses of the private placement offerings are that the issuers must already have a strong network of accredited investors, as well as additional disclosure requirements for sophisticated investors that are considered too costly.[807] These weaknesses prevent companies with a

[801] Vargas, Dasari and Vargas (n 794) 3.
[802] Joyce (n 796) 352.
[803] Ibid 353.
[804] Ibid 354.
[805] Ibid. A sophisticated investor is a term that has been used to represent a certain types of investors' category, as explained by the SEC Rule 506 § 230.506(b)(2)(ii), which mean 'Each purchaser who is not an accredited investor either alone or with his purchaser representative(s) has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or the issuer reasonably believes immediately prior to making any sale that such purchaser comes within this description'. See Zachary James Wilson, 'Challenges to Crowdfunding Offering Disclosures: What Grade Will Your Offering Disclosure Get?' (2016) 38 *Campbell Law Review* 457, 465.
[806] Joyce (n 796) 354.
[807] Ibid 354.

small personal network of accredited investors from choosing this option to raise funding.[808]

7.2.2 Australia

In Australia, online platforms had been in operation as intermediaries before *the Crowd-sourced Funding Act* was promulgated. In 2017, Australia amended Chapter 6D.3A of the *Corporations Act 2001* (Cth) and enacted the *Crowd-sourced Equity Funding (CSEF) Act 2017*.[809] It broadened the current limitation of 'online platforms offering investment' that had been available for small businesses and start-ups but not for retail investors.[810] It has provided an opportunity for retail investors to invest in the platform and provided them with direct access to the risky business of small companies and start-ups.[811]

This Act enables equity crowdfunding offerings to retail investors which had previously been banned.[812] Prior to the CSEF Act, Chapter 6D of the Corporation Act required financial reporting and fundraising disclosure reports for any proprietary company or public company that intended to use equity crowdfunding.[813] Proprietary companies could only have a maximum of '50 non-employee shareholders' and were prohibited from conducting a public offering.[814] These requirements were considered too costly and a burden for start-ups and small companies to use equity crowdfunding.[815] The amendment of s 45A(1) of *the Corporations Act of 2001* in 2018 (*Crowd Source Equity Funding for Proprietary Companies Act of 2018* (Cth)) removed the 50 shareholder cap and enabled proprietary companies to do equity crowdfunding.[816]

CSEF Act allows any investor to invest through an equity crowdfunding platform.[817] The issuers may have more of the shareholder cap without the requirement to comply as a public company for up to five years after the registration.[818] Proprietary

[808] Ibid.
[809] Akshaya Kamalnath and Nuannuan Lin, 'Crowd-sourced Equity Funding in Australia - A Critical Appraisal' (2019) 47(2) *Federal Law Review* 288, 289.
[810] *Corporations Amendment (Crowd-sourced Funding) Act 2017* (Cth) Explanatory Memorandum Chapter 1 para 1.7.
[811] Ibid Explanatory Memorandum, Chapter 1 para 1.8.
[812] Kamalnath and Lin (n 809) 289.
[813] Ibid 290.
[814] Ibid.
[815] Ibid. See also Gabison (n 639) 373.
[816] Kamalnath and Lin (n 809) 290.
[817] Ibid 291.
[818] Ibid.

companies are also allowed to have more than 50 shareholders if using equity crowdfunding, since they are not be counted as additions to the 50-shareholder cap.[819]

7.2.3 Indonesia

Before the Indonesian FSA Regulation of equity crowdfunding, the regulatory regime did not provide support for equity crowdfunding offering. This was not unusual; most countries had not fine-tuned their securities law to accommodate fundraising through equity crowdfunding.[820] Any offering of securities to the public using any media, including the internet, must comply with the Capital Market Law and regulations that require the issuer to file a registration of statement to the Indonesian FSA. The requirement is considered expensive for many new start-up ventures as it involves paying an accountant, a legal expert, underwriters, and other expenses related to the process of an initial public offering.[821]

The only exception is FSA regulation Number 26/POJK.04/2020, which provides that a securities offering under one billion rupiahs (A$100,000) in less than a twelve-month period is excluded from the definition of a securities public offering.[822] However, it should be noted that any person who wishes to use this exemption will be excluded from the capital market regulatory regime, including the disclosure requirements and financial transparencies such as filing financial statement reports. Moreover, the position of investors is vulnerable since there is no supervision of the conduct of the issuers' company and the crowdfunding platform. Consequently, investors can only rely on the Indonesian civil code, general contract clause, and consumer protection laws for any breaches of the laws or contracts by fund-seekers or platforms. Therefore, although equity crowdfunding can operate in Indonesia by using available exceptions provided by the FSA regulation, the regulatory regime has not provided adequate legal protection for investors and an effective regulatory environment.

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[819] Ibid.

[820] Bowman (n 95) 319.

[821] *Peraturan Bapepam No. IX.C.1 tahun 2000 tentang Pedoman Mengenai Bentuk dan Isi Pernyataan Pendaftaran Dalam Rangka Penawaran Umum [Bapepam Regulation No. IX.C.1 of 2000 on The Form and Content of a Registration Statement for a Public Offering]* (Indonesia).

[822] *Peraturan OJK No. 26/POJK.04/2020 Tahun 2020 tentang Penawaran yang Bukan Penawaran Umum [Indonesia FSA Regulation No. 26/POJK.04/2020 of 2000 on Offerings that are not categorized as a Public Offering]*' (Indonesia) Articles 2-3.

7.2.4 Similarities and differences of the institutional background of the equity crowdfunding

There are some differences between Indonesia's regulation with the US and Australia in this matter. In the US and Australia, start-ups can raise funding through equity crowdfunding without any specific regulation to address equity crowdfunding. The specific equity crowdfunding regulation in the two countries lifts the standard requirements of a public offering and relaxed the restrictions of offering equity crowdfunding only to accredited investors and instead make it available to the public. In Indonesia, equity crowdfunding is only an option under the fundraising restrictions mentioned above and cannot be used to offer securities, even for accredited investors. Indonesia's regulation does not differentiate retail investors and accredited investors; even the term accredited investors is not used in the Indonesian securities laws and regulations. Consequently, while Australia and the US learned from the existing equity crowdfunding market and fine-tuned their regulatory system to give access to retail investors, Indonesia did not have an equity crowdfunding market at all before the implementation of the FSA Regulation.

7.3 Limitation of Companies to Access Equity Crowdfunding

7.3.1 The US

The JOBS Act creates a new type of issuer, 'emerging growth companies' (EGCs), to indicate that it facilitates young companies to raise funding. The maximum amount that can be raised through equity crowdfunding by an EGC in a 12-month period is US$1 million (A$1.4 million). One of the EGCs' qualifications is a company with 'total annual gross revenues of less than $1,000,000,000'.[823] A company will no longer be defined as an EGC once one of the following conditions has been reached:[824]

> (i) the last day of the fiscal year in which the issuer surpasses the revenue threshold, (ii) the last date of the fiscal year following the fifth anniversary of the first sale of common equity securities under the JOBS Act, (iii) the date on which the company has issued more than $1,000,000,000 non-convertible debt during a three-year period, or (iv) the date on which the issuer becomes a 'large accelerated filer'.

One of the important features of the JOBS Act is that the EGCs may submit a confidential draft of a registration statement to the SEC prior to the public filing.[825] The

[823] Todd Blakeley Skelton, '2013 Jobs Act Review & Analysis of Emerging Growth Company IPOs' (2013) 15 *Transactions: The Tennessee Journal of Business Law* 455, 456.
[824] Ibid 457. See also *The Jumpstart Our Business Startups Act of 2012*, 15 USC s101(a).
[825] The Jumpstart Our Business Startups Act (n 824) § 106 (a).

SEC will then conduct a 'confidential non-public review' that allows the EGCs to start the securities offering process without disclosing any sensitive information concerning their business [826] and the SEC is bound not to disclose this information.[827] If the EGC chooses not to complete the offering, the draft registration statement can be withdrawn without making it public.[828] Prior to the equity crowdfunding offering, an issuer may disseminate a 'research report' to the public. Such a report is not considered as information concerning a 'factual business condition' that is intended to create public interest in a securities offering.[829] However, the EGC has to publicly file the registration statement no more than twenty-one days before the roadshow starts.[830]

The JOBS Act has also lifted the limitation on communication between the issuer and potential investors before filing a registration statement, as provided by *the Securities Exchange Act of 1934*.[831] EGCs and authorized persons such as a broker, a dealer, and a securities analyst, are allowed to communicate with potential investors, either accredited investors or qualified institutional buyers, before and after filing a registration statement.[832] Skelton explains that according to SEC Rule 501 of Regulation D under *the Securities Act of 1934*, the term accredited investors includes the following parties:[833]

> … banking, insurance, and investment institutions; employee benefit plans; business development companies; certain 501(c)(3) organizations; directors or insiders of the issuers; individuals (i) with an individual net worth or joint net worth with that person's spouse of $1,000,000, excluding the value of a home, or (ii) annual income in excess of $200,000, or $300,000 jointly; trusts with total assets greater than $5,000,000, and entities in which the equity owners are all accredited investors.

This provision enables start-ups to 'test the water' and to assess the interest of potential investors if they decide to use an equity crowdfunding offering. Hamel criticizes this provision, arguing that while it is good on paper, most start-ups would be reluctant to disseminate any materials that the SEC has not reviewed due to potential liability.[834]

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[826] Skelton (n 823) 457.
[827] Ibid 458.
[828] Ibid 459.
[829] *The Jumpstart Our Business Startups Act* (n 824) § 105(a). See also The US SEC, 'Regulation Crowdfunding' <https://www.sec.gov/divisions/corpfin/guidance/reg-crowdfunding-interps.htm>.
[830] Skelton (n 823) 458.
[831] *The Jumpstart Our Business Startups Act* (n 824) § 105(b).
[832] Skelton (n 823) 461.
[833] Ibid 460.
[834] Benjamin Hamel, 'An Examination of the Jumpstart Our Business Startups Act: How Jobs Act Exemptions May Help Startups and Hurt Investors' (2016) 17 *Houston Business and Tax Law Journal* 59, 71.

Not all companies have access to equity crowdfunding as alternative funding and exemption from the requirement to file a registration statement. One of the filters to prevent improper use of equity crowdfunding is disqualification of certain companies.[835]

7.3.2 Australia

Only unlisted public companies and proprietary companies that have 'consolidated assets and annual revenue' of less than A$25 million are eligible to use equity crowdfunding.[836] The CSEF Act categorizes equity crowdfunding offering as an 'initial public offering (IPO) fundraising', and requires the issuer to provide an 'offer document'[837] and ensure that it is in a 'clear, concise and effective manner'[838] so that retail investors can understand it. The issuer also must ensure that the offer document is not 'misleading or deceptive'.[839] The maximum amount to be raised by an issuer is limited to only A$5 million in every twelve months.[840] The other conditions that must be satisfied by the issuer include: '(a) the company is a public company limited by shares; (b) the company's principal place of business is in Australia; … (e) neither the company, nor any related party of the company, is a listed corporation'.[841]

7.3.3 Indonesia

Indonesian FSA Regulation concerning equity crowdfunding restricts access to certain companies with specific requirements. First, the legal form of the issuer must be a limited liability company.[842] Second, the issuer is not a company controlled by a business group or a conglomeration. Third, it is not a public company, a listed company, or either a subsidiary of a public company or a listed company. Fourth, it has total assets of less than Rp10 billion (A$1 million), not including land and buildings.[843] An issuer can access equity crowdfunding only through an equity crowdfunding platform, with the maximum amount of funds raised within 12 months is Rp10 billion (A$1 million).[844]

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[835] Skelton (n 823) 476.

[836] *Corporations Act 2001* (Cth) s 738H(1)(e); Australian Securities and Investments Commission, *ASIC Regulatory Guide 261: Crowd-Sourced Funding Guide for Companies 2020* (June 2020) para 261.6.

[837] *Crowd-sourced Funding Act 2017* (Cth) (n 810) s611 item 12.

[838] Ibid s 739K.

[839] Ibid s 738Y(1).

[840] Ibid s 738G(2)(d); *ASIC Regulatory Guide 261* (n 836) para 261.42.

[841] *Crowd-sourced Funding Act 2017* (Cth) (n 810) s 738H(1).

[842] A limited liability company is 'a legal entity which constitutes an alliance of capital established pursuant to a contract in order to carry on business activities with an authorised capital all of which is divided into shares and which fulfils the requirements stipulated in this Act and its implementing regulations'. See *Undang-undang No. 40 tahun 2007 tentang Perseroan Terbatas [Law No. 40 of 2007 on Limited Liability Company]* (Indonesia), article 1 item 1.

[843] *Indonesian FSA Regulation on Equity Crowdfunding* (Indonesia) (n11) articles 6, 33, and 34.

[844] Ibid article 5(1).

7.3.4 Similarities and differences of limitations on companies seeking equity crowdfunding

The similarities between the three regulations are that they limit access to equity crowdfunding only to certain companies that have a certain amount of assets and or revenue in a year. In addition, they all stipulate the maximum amount that fundraising can raise through securities offering under other restrictions. The apparent difference between the US regulation and the other regulations is that the US regulation facilitates communication between the potential issuer with the SEC. Therefore, it allows potential issuers to communicate with potential investors to test the water, and whether the demand to buy the securities offered will be sufficiently attractive for the issuer. This is a significant feature that can encourage the confidence of potential issuers, especially those concerned with the confidentiality of information and the level of market demand that may affect the success of the offering.

7.4 Requirement of Equity Crowdfunding Investors

7.4.1 The US

The JOBS Act (Section 4(a)(6)) provides investment limits for equity crowdfunding investors. The investment cap restricts the amount of investment for each investor;[845] the maximum annual investment by investors who have income less than US$100,000 (A$134,000) is US$2,000 (A$2,680) or 5 percent of their income or net worth. Investors with annual income of more than US$100,000 are limited to a maximum of 10 percent of their income or net worth; and the maximum of an investors' aggregate investment in a 12-month period must be less than $100,000 (A$134,000).[846]

Under the private placements Rule 506 (b) and (c) of Regulation D in section 4(a)(2) of *the Securities Act of 1933*, issuers can be exempted under certain requirements from obligations to file a registration statement.[847] There are differences between Rule 506 (c) and 506(b) of the SEC Regulation D. Rule 506(c) allows offerings to non-accredited investors, while companies that use Rule 506(b) can only sell securities to a maximum of 35 non-accredited investors and must exercise verification or due diligence to ascertain that all investors are accredited investors. Therefore, self-certification, which

[845] C. Steven Bradford, 'Online Arbitration as a Remedy for Crowdfunding Fraud' (2017) 45(4) *Florida State University Law Review* 1165, 1168.

[846] Groshoff, Nguyen and Urien (n 43) 281-2.

[847] Securities and Exchange Commission, *Private placements - Rule 506(b), Small Business/Exempt Offerings* <https://www.sec.gov/smallbusiness/exemptofferings/rule506b>.

is allowed under Rule 506 (b), is not allowed under Rule 506 (c).[848] Rule 506 (c) authorizes issuers to raise unlimited funds; however, the issuers must only sell to accredited investors and conduct verification, 'which could include reviewing documentation such as … tax return, bank and brokerage statements, and credit report'.[849] To fulfil this limitation, the Rule allows the issuers to use verification services from a third party or rely on certifications from the investors' registered broker-dealer, investment adviser, certified public accountant, or licensed attorney.[850] It should be noted that the definition of high net worth in the JOBS Act is lower than the standard of accredited investors which sets the annual salary of the individual at US$200,000 or a net worth of US$1 million.[851]

The US regulation employs investors' self-certification[852] to determine if investors meet the limitation requirement of their income and investment cap in equity crowdfunding. Although the equity crowdfunding platform is required to ensure that investors do not exceed the investment limit set by the regulation,[853] it was considered that self-certification could help intermediaries verify each investor more practically, rather than rely on the platform's independent efforts.[854] The key to the implementation is that the platform must 'have a reasonable basis for believing that the investor satisfies the investment limitation' and relying on investors' self-certification is one of the instruments that an equity crowdfunding platform employs.[855]

7.4.2 Australia

The investor cap in Australia is A$10,000 in one year for a retail client.[856] The intermediaries are required to reject an investor's application if the investment cap is breached; however, there is no sanction for this violation.[857] In addition, CSEF in

[848] Vargas, Dasari and Vargas (n 794) 3; See also Skelton (n 823) 466.

[849] Securities and Exchange Commission, *Rule 506 of Regulation D, Fast Answer* <https://www.sec.gov/fast-answers/answers-rule506htm.html#:~:text=Rule%20506%20of%20Regulation%20D%20provides%20two%20distinct%20exemptions%20from,they%20offer%20and%20sell%20securities.&text=This%20means%20that%20any%20information,from%20false%20or%20misleading%20statements.>.

[850] Vargas, Dasari and Vargas (n 794) 3; See also Skelton (n 823) 467-8.

[851] Vargas, Dasari and Vargas (n 794) 3.

[852] Ibid.

[853] *The Jumpstart Our Business Startups Act* (n 824) § 302(b).

[854] *Crowdfunding*, 17 CFR § 227.303 (b)(1) (2015).

[855] Ibid.

[856] *Crowd-sourced Funding Act 2017* (n 810) s 738ZC(1)(b); Australian Securities and Investments Commission, *ASIC Regulatory Guide 262: Crowd-Sourced Funding Guide for Intermediaries 2018* (October 2018) para 262.15.

[857] Kamalnath and Lin (n 809) 292.

Australia uses a cooling-off period in which investors have the right to withdraw their application to an equity crowdfunding offer anytime within 'five days of applying'.[858] These two methods are intended to provide protection for investors.[859]

7.4.3 Indonesia

The FSA regulation requires that only investors who can analyse the risk of the issuers may buy shares offered through equity crowdfunding. The investment cap for investors who have less than Rp500 million (A$ 50,000) is a maximum of five percent from their income, while for those who have income more than Rp500 million (A$ 50,000) the investment cap is ten percent of their income.[860] The investors have the right to cancel the application to buy shares within 48 hours of their decision to purchase them.[861]

One of the exceptions in the regulation is that the investment cap is not applicable to a legal entity and those with investment experience in the capital market; that is, having a securities account at least two years before the equity crowdfunding offering.[862] The reason for this exception is unclear, but it seems that the drafter of the regulation assumes that legal entities or people with investment experience in the capital market have the capacity to protect themselves from risk in investing in equity crowdfunding.

7.4.4 Similarities and differences in the requirements of investors

Regulations in all three countries have an investment cap to protect retail investors from excessive loss in equity crowdfunding. Both the US and Australia have the concept which differentiates retail investors from sophisticated or accredited investors. These criteria are based on two assumptions:[863] first, the expertise of the business in financial services such as insurance companies, banks, or investment institutions; second, the individual's net worth, the amount of assets, financial sophistication, knowledge, and experience.

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[858] *ASIC Regulatory Guide 262* (n 856) para 262.15; *ASIC Regulatory Guide 261* (n 836) para 261.7.
[859] Kamalnath and Lin (n 809) 292.
[860] *Indonesian FSA Regulation on Equity Crowdfunding* (Indonesia) (n11) article 42(2).
[861] Ibid 43.
[862] Ibid article 42(3).
[863] *The Securities Act of 1933* (n 794) §2(a)(15); *Corporations Act 2001* (Cth) (n 836) ss 761G, 761GA

The US study[864] has shown that not all investors in stock exchanges are active investors; most are passive investors who make investment decisions based on the advice of the brokers or dealers. Therefore, the criteria of investment cap in the Indonesian regulation, which exempt legal entities and people who have experience in the capital market, is not consistent with previous studies in the US and also has no strong reason if compared with the criteria of exemption from investment cap in the US and Australia. In addition, people may question the basis for assuming that all legal entities are capable of assessing or ready to absorb the risk of loss from investing in equity crowdfunding.

7.5 Required Information for Potential Investors in Equity Crowdfunding Offerings

7.5.1 The US

The issuer who uses Section 4(a)(6) of the *Securities Act of 1933* is required to file an annual report to the SEC and disclosure based on the Form C standard.[865] This disclosure is less than the required standard of small offering under Regulation A, but comparable to that in Regulation D offerings, which are offerings of securities via a private placement memorandum (PPM).[866]

The disclosure standard based on Section 4(a)(6) is an instrument of the SEC to protect investors who are inexperienced and prone to investment risk.[867] Most start-ups do not have audited financial reports because the cost of preparation is too high.[868] The standard disclosure requirements in Section 4(a)(6) cause the issuers to efficiently fulfil the requirements while creating a balance between the cost of disclosure, which can be quite substantial, and the amount of fund-raising from equity crowdfunding.[869] In the US, the Financial Industry Regulatory Authority (FINRA), as the only SRO for brokers and dealers, has the authority to require funding portals to become FINRA's members. It regulates the prohibition in communications in the funding portals to be: 'false, exaggerated, unwarranted, promissory, or misleading statements or claims; material omissions of fact or qualifications; exaggerated or unwarranted claims, opinions,

[864] Easley and O'hara (n 582) 523.
[865] Vargas, Dasari and Vargas (n 794) 3.
[866] Ibid.
[867] Ibid.
[868] Ibid 4.
[869] Ibid.

forecasts, or predictions regarding performance'.[870] It also requires the funding platforms to report any violations and to make certain public disclosures.[871]

Despite the required standard of disclosure and cap on investment, one could argue that there is still a danger of risk for investors in start-ups. But 'a good idea and smart founders' can easily raise donations through Kickstarter or other donation crowdfunding platforms.[872] The potential cost, time, and other resources to meet the requirements of Section 4(a)(6) may diminish the value of equity crowdfunding and reduce its competitiveness compared with alternative sources of funding.[873] One critique from industry players concerning the JOBS Act is that the cost of managing equity crowdfunding regulation requirements can exceed the benefit of accessing equity crowdfunding.[874] The information required for an equity crowdfunding offering is explained in Table 7.1 below.

7.5.2 Australia

In Australia, a CSEF offer document must be prepared for fundraising through equity crowdfunding,[875] and be published only through a single equity crowdfunding platform.[876] Some of the information that must be included in an offer document is described in Table 7.1 below.

7.5.3 Indonesia

In Indonesia, an issuer must provide documents and information, as explained in Table 7.1, to an equity crowdfunding platform.[877] An issuer can only raise funds through one platform within a period of time.[878] The platform uploads the offering documents and information on its website.[879]

[870] Ibid.
[871] Ibid.
[872] Ibid.
[873] Ibid 4.
[874] Joyce (n 796) 351.
[875] *Crowd-sourced Funding Act 2017* (Cth) (n 810) s 738J.
[876] Ibid s 738L.
[877] *Indonesian FSA Regulation on Equity Crowdfunding* (Indonesia) (n 11) article 35.
[878] Ibid article 24.
[879] Ibid article 16(1)b.

Table 7.1: Comparison of information that must be provided by an equity crowdfunding issuer for the investors

No	Type of the information	*The US JOBS Act of 2012*	Indonesian FSA Regulation	Australian ASIC RG 61, year 2020
1	About the company	The company's name, physical address, legal status, website	Articles of association and amendments, organizational structure (the name of the company and the address are in the articles of association)	Company's details (name type, office address)
2	About the key person	The name of officers and directors, and the owner of twenty percent or more of the company	In the articles of association normally the name of directors, commissioners and the structure of shareholder ownership are described	Directors and senior managers (identity, roles, skills and relevant experience)
3	About the business	A description of the business and the anticipated business plan	The business plan	Nature of the business (nature of the development, which sectors), business strategy and model (how it will generate money or capital growth), organizational structure
4	Financial information	A description of financial conditions, including financial statement and filed income tax return	Financial statement, at least using the accounting standard for entities without public accountability	Financial statements (using accounting standard for a 12-month period). If less than 12-months then must include the financial statement from the date of establishment.
5	Purpose of fund raising	A description of the stated purpose and intended use of the proceeds of the offering sought in a 'reasonable detailed description'	How the funds will be used	How the funds will be used, offer period

6	Target of offering amount	The target of offering amount, the deadline to reach it, and regular updates regarding progress of the issuer in meeting the target	The target of offering amount and the minimum amount obtained in the offering	Maximum and minimum subscription amount
7	Price of securities and how it was determined	The price to the public of securities or the method for determining the price	Mechanism concerning the price of the shares	A fair value estimate of the company's shares
8	Ownership, capital structure, the term of securities	A description of the ownership and capital structure of the issuer, including: • The term of securities • A description of how the exercise of the rights held by existing shareholders could negatively impact on purchasers of the securities being offered	Not included in the FSA regulation	Capital structure (equity pre and post offering), debt (including loans and other third-party loans), and other financing, all classes of shares, the rights of the offered shares (including voting rights, dividend rights, issue of transfer of shares)
9	Valuation	Current valuation method and future valuation if there is subsequent corporate action	Not addressed specifically	Not addressed specifically
10	Risks	Risks associated with minority shareholders, corporate actions, related-parties' transactions, and sale of company assets	The main risks associated with the issuer, the liquidity of securities, and dividend policy	A general risk warning about equity crowdfunding, main risks, and any market or competition risk, failure to secure key personnel, important contacts, intellectual property, financing risk, legal risks, technology and operational risks

7.5.4 Similarities and differences of required information for investors

The comparative table above indicates that there are many similarities in the information an issuer is required to provide in the three countries. However, the US regulation puts valuation as a separate category, while in Australia and Indonesia it is not a separate category. The other difference is that in the US and Australia but not in Indonesia information about the issuer's capital structure needs to be provided by an issuer.

7.6 Standard of Disclosure for Equity Crowdfunding and Concern about Fraud

7.6.1 The US

Putting in place adequate investor protection and cost-effective regulation for crowdfunding issuers is not always free from criticism. It is considered that investor protection has a positive correlation with overall economic growth because it affects a firms' ability to raise external capital.[880] In the US, it is a widely-held view that the primary goal of securities regulation is investor protection, while other goals, such as 'economic efficiency and capital formation' are considered secondary.[881] For some experts, the JOBS Act has raised concerns about investor protection. The requirement to file a registration statement is meant to prevent fraudulent securities offerings. However, the Act exempts equity crowdfunding offering from this requirement.[882] While it must use an equity crowdfunding platform, the standard disclosure statement as regulated in a general securities offering is reduced to accommodate the cost for small businesses in accessing equity crowdfunding.[883] Moreover, the disclosure requirement is not required to be reviewed and approved by the SEC.[884]

A lower standard of disclosure for crowdfunding could be detrimental to investor protection, since unsophisticated investors would be exposed to risky

[880] Rui Castro, Gian Luca Clementi and Glenn MacDonald, 'Investor Protection, Optimal Incentives, and Economic Growth' (2004)(3) *The Quarterly Journal of Economics* 1131, 1131.

[881] Donald C. Langevoort, 'The SEC as a Lawmaker: Choices about Investor Protection in the Face of Uncertainty' (2006) 84 *Washington University Law Review* 1591, 1596. See also Onnig H. Dombalagian, 'Licensing the Word on the Street: The SEC's Role in Regulating Information' (2007) 55 *Buffalo Law Review* 1, 33; Joan MacLeod Heminway, 'What Is a Security in the Crowdfunding Era' (2012) 7 *Ohio State Entrepreneurial Business Law Journal* 335, 338.

[882] Bradford (n 845) 1167.

[883] Ibid.

[884] Ibid. See also *Crowdfunding* (n 854) §§ 227.100, 227.201.

investments [885] and fraudsters could find new ways to use the internet for scamming investors.[886] Gillen and Pogorski illustrated how a start-up company may provide 'a very optimistic view' about the prospects of its business and focus on positive information, rather than give an honest picture of the start-up's potential.[887] Yamen and Goldfeder added that although the Act creates wide opportunities for retail investors, at the same time it might lead to an economic bubble that causes retail investors to suffer financial disaster.[888]

Some authors argue that the concern about fraud in crowdfunding is exaggerated. Epstein and Hashemi argued that: 'While fraud is a likely consequence of the JOBS Act, outright fraud may not be a big issue as others have suggested'.[889] In reality, social media such as Twitter has increased 'collective shareholder activism'; despite being geographically separated, social media has facilitated investors to form groups and establish rapport to share information.[890] Heminway uses the term 'affinity group' for 'a group of people' who connect via the internet and have the same interest in receiving and using information, and then sharing and passing it on selectively to the other members or to the crowd.[891] Schwartz mentions that a 'star score' as widely used on eBay might be a cost-effective way to lessen the risk of fraud in securities crowdfunding.[892] James advises that social media information does not have to be

[885] Laura Michael Hughes, 'Crowdfunding: Putting a Cap on the Risks for Unsophisticated Investors' (2013) 8 *Charleston Law Review* 483, 499. See also Ross S. Weinstein, 'Crowdfunding in the U.S. and Abroad: What to Expect When You're Expecting' (2013) 46 *Cornell International Law Journal* 427, 434; Timothy Bates and Alfred Nucci, 'An Analysis of Small Business Size and Rate of Discontinuance' (1989) 27(4) *Journal of Small Business Management* 1, 5.

[886] Thomas Lee Hazen, 'Crowdfunding or Fraudfunding - Social Networks and the Securities Laws - Why the Specially Tailored Exemption Must Be Conditioned on Meaningful Disclosure' (2011) 90 *North Carolina Law Review* 1735, 1767. See also Sharon Yamen and Yoel Goldfeder, 'Equity Crowdfunding - A Wolf in Sheep's Clothing: The Implications of Crowdfunding Legislation under the JOBS Act' (2015) 11 *Brigham Young University International Law & Management Review* 41, 66.

[887] Mark Gillen and Diana Pogorski, 'Crowd-Funding Offers under Canadian and US Securities Regulation: Will an Exemption Work' (2015) 93 *Canadian Bar Review* 107, 149.

[888] Yamen and Goldfeder (n 886) 42.

[889] Michael M. Epstein and Nazgole Hashemi, 'Crowdfunding in Wonderland: Issuer and Investor Risks in Non-Fraudulent Creative Arts Campaigns under the Jobs Act' (2016) 6 *American University Business Law Review* 1, 5-6.

[890] Seth C. Oranburg, 'Bridgefunding: Crowdfunding and the Market for Entrepreneurial Finance' (2015) 25 *Cornell Journal of Law and Public Policy* 397, 425-6.

[891] Joan MacLeod Heminway, 'Investor and Market Protection in the Crowdfunding Era: Disclosing to and for the Crowd' (2013) 38 *Vermont Law Review* 827, 833.

[892] Andrew A. Schwartz, 'Keep It Light, Chairman White: SEC Rulemaking under the Crowdfund Act Roundtable' (2013) 66 *Vanderbilt Law Review* 43, 58.

uncontrollable, especially concerning monitoring disclosures.[893] He proposes that 'a list of several compliance risk factors' such as content standards, monitoring, and information security can be employed by issuers to assess social media effectiveness.[894]

Optimal regulation for equity crowdfunding has to ensure that the trade-off between the expected level of investor protection and the cost of seeking seed capital for small ventures will provide ventures with easier access to capital compared to the alternatives of seed funding, such as angel investors and venture capital.[895] This argument challenges the traditional law and finance view that securities regulation is a substantial tool to establish investor protection and market development[896] and that 'higher disclosure requirements and liability standards are positively correlated with larger stock market'[897]. Therefore, the availability of venture capital and angel investors as alternative seed finance for new ventures influences the optimum regulation for equity crowdfunding.

In the US, *the Securities Act of 1933*, *the Exchange Act of 1934*, and the SEC regulation aim to mitigate the problem of information asymmetries 'between securities issuers and investors'.[898] Since then, securities regulation has adapted and adjusted to scandals in accounting and finance, financial crises, corporate governance issues, and innovation in the financial sector.[899] However, Hornuf and Schwienbacher found that using regulation to maximize investor protection tended to discourage start-up companies from using equity crowdfunding.[900]

The JOBS Act has reduced the standard of disclosure requirements compared with what was previously required by *the Securities Act of 1933*. The initial disclosure requirements included the legal status and management of companies, the business plan, and financial disclosure, not necessarily audited for offerings of less than $100,000 (A$134,000), reviewed by a public accountant for $100,000-$500.000 (A$134,000-A$670,000), and audited financial statement for more than a $500,000 (A$670,000)

[893] Wilson (n 805) 490-1.
[894] Ibid.
[895] Hornuf and Schwienbacher (n 670) 591.
[896] Ibid 579.
[897] Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'What Works in Securities Laws?' (2006)(1) *The Journal of Finance* 1, 19.
[898] Hornuf and Schwienbacher (n 670) 579.
[899] Ibid.
[900] Ibid.

offering).[901] After the offering, issuers must file annual reports to the SEC and provide the reports to investors.[902] James argues that the disclosure requirement in Title III of the JOBS Act in practice will have little effect in protecting investors from fraud.[903]

An effective rule is required to prevent fraudulent equity crowdfunding offering or 'the lemon problem' where the fraudulent offerings could drive out honest offerings and destroy crowdfunding as a viable investment vehicle.'[904] Goshen and Parchomovsky assert that rules restricting fraud have several functions.[905] First, they are intended to provide reliable information for investors. Otherwise, any investor who wants to use the information has to conduct a costly verification process. Therefore, they argue that '[t]he ban on fraud and manipulation reduces verification costs because explicit information cannot be misstated, material facts cannot be omitted, and implicit information cannot be manipulated'. The second function is to reduce the risk associated with 'capturing the divergence between value and price'. The third function is to preserve the reputation of the analyst because many investors rely on an analyst's information to make investment decisions. Fraudulent or misstatement of information distorts the analysis process and distorts the analyst's prediction. The fourth function is increasing market liquidity because the lower frequency of misstatement can lower the risk of information asymmetry. This condition lowers the spread of bid-ask in transactions and subsequently improves market liquidity.

Black explains that there are several requirements to ensure sound investor confidence.[906] Firstly, investors believe that they are treated in an honest and fair way. Secondly, investors believe that they have the required instrument to make sound investment decisions. Thirdly, investors' education is part of the policy goal to 'promote informed investment decision making'. Lastly, investors believe that the regulatory

[901] Sean M. O'Connor, 'Crowdfunding's Impact on Start-up IP Strategy' (2013) 21 *George Mason Law Review* 895, 908-9.

[902] Ibid.

[903] Thomas G. James, 'Far from the Maddening Crowd: Does the Jobs Act Provide Meaningful Redress to Small Investors for Securities Fraud in Connection with Crowdfunding Offerings' (2013) 54 *Boston College Law Review* 1767, 1779.

[904] Bradford (n 845) 1168.

[905] Goshen and Parchomovsky (n 648) 741-3.

[906] Barbara Black, 'Are Retail Investors Better Off Today' (2007) 2(2) *Brooklyn Journal of Corporate, Financial & Commercial Law* 303, 306-7, 337.

agency is competent and consistent in performing the task of encouraging investors' confidence.

The JOBS Act does not exempt Rule 10b-5 that prohibits someone from using a deceptive scheme or creating a material misstatement in the process of a securities transaction.[907] A person can take action against an issuer who liable of making:[908]

> … an untrue statement of a material fact or omits to state a material fact required to be stated or necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading, provided that the purchaser did not know of such untruth or omission; and … does not sustain the burden of proof that such issuer did not know, and in the exercise of reasonable care could not have known, of such untruth or omission.

The person who has the right to take action is the actual purchaser 'of the securities in question', while potential purchasers and existing shareholders who felt 'fraudulently induced not to sell' or sustained loss because of fraudulent activity, cannot bring a claim based on Rule 10b-5.[909] There are different opinions about whether an equity crowdfunding platform should be held liable if an issuer creates a material misstatement in the equity crowdfunding offering.[910] The SEC is of the view that a platform should not be liable for the conduct of the issuer as long as it has established policies and procedures and its conduct meets the reasonable checking requirement concerning information and documents of the issuer before posting on the platform's website.[911]

In the US, the SEC can take civil action against fraudulent conduct to protect investors under 'section 17(a) of *the Securities Act 1933* and Rule 10b-5 under *the Exchange Act of 1934*.[912] The government can also bring criminal actions for violation of either antifraud provision.[913] However, the effectiveness of this approach is questionable because of the limited resources of the SEC and the insignificant amount of the loss compared to the cost of this action.[914] Several factors are usually considered if the SEC

[907] Kurtis Urien and David Groshoff, 'An Essay Inquiry: Will the Jobs Act's Transformative Regulatory Regime for Equity Offerings Cost Investment Bankers' Jobs' (2013) 1 *Texas A&M Law Review* 559, 574.

[908] *The Jumpstart Our Business Startups Act* (n 824) s302(b); *The Securities Act of 1933* (n 794) s4A(c)(3).

[909] Wilson (n 805) 476.

[910] Ibid 476.

[911] *Crowdfunding* (n 854) p 71478-9.

[912] Bradford (n 845) 1181.

[913] Ibid.

[914] Ibid 1168. See also Alan R. Palmiter, 'Pricing Disclosure: Crowdfunding's Curious Conundrum' (2012) 7 *Ohio State Entrepreneurial Business Law Journal* 373, 419.

wishes to take enforcement action, such as: 'social benefit, including, among other things, the amount of harm to investors, and the likely deterrent effect of an enforcement action'.[915]

Retail investors in equity crowdfunding will be unlikely to have the option of going to court if an 'entrepreneur [is] liable for securities fraud' because the amount of the investment is too small and not sufficiently attractive[916] for the class-action lawyer.[917] In a lawsuit based on a 'private right of action', investors may only recover the loss of the investment, which most likely would be less than the cost of the lawsuit.[918] Mashburn explains that a US study found most class action lawyers only considered a lawsuit attractive if the recovered damages resulting from a fraud lawsuit were at least US$20 million. Since in equity crowdfunding the maximum funds raised are US$1 million, the maximum damages would also be US$1 million. Therefore, the possibility of class-action suits in equity crowdfunding is small.[919]

The plaintiffs do not have to prove that the defendant had an intention to defraud investors.[920] Section 12(b) of *the Securities Act of 1933* provides that:[921]

> [I]f the person who offered or sold such security proves that any portion or all of the amount recoverable under subsection (a)(2) represents other than the depreciation in value of the subject security resulting from such part of the …. communication, with respect to which the liability of that person is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statement not misleading, then such portion or amount … shall not be recoverable.

The investors as the plaintiff only have to show that the defendant:[922]

> [made] an untrue statement of a material fact or omit[ted] to state a material fact required to be stated or necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading.

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[915] Bradford (n 845) 1182. Compare Palmiter who argue that that SEC prioritizes cases based on several factors: '(1) the message delivered to the industry and public; (2) the amount of investors harm done; (3) the deterrent value of the action; and (4) the SEC's visibility in certain areas, such as insider trading and financial fraud.' in Palmiter (n 903) 419.

[916] Bradford (n 845) 1166.

[917] Ibid 1169.

[918] James (n 903) 1769.

[919] David Mashburn, 'The Anti-Crowd Pleaser: Fixing the Crowdfund Act's Hidden Risks and Inadequate Remedies' (2013) 63 *Emory Law Journal* 127, 167.

[920] Bradford (n 845) 1184. See also Oranburg who states that 'To win an award of damages from fraud under Regulation Crowdfunding, plaintiffs do not have to prove that the defendant's fraud caused the plaintiffs loss, nor must plaintiffs prove that defendants acted wilfully'. Oranburg (n 891) 427.

[921] *The Securities Act of 1933* (n 794) § 12(b).

[922] Bradford (n 845) 1184.

The investors would recover the entire purchase price, except where the defendant could prove that the fraud did not cause all or some of the damages.[923] The defendant could escape liability if the defendant could prove that 'it did not know, and in the exercise of reasonable care could not have known of the misstatement.'[924] In a private action brought under Rule 10b-5, the plaintiff must prove these four elements: 'reliance, loss causation, damages, and scienter', and the plaintiff must have purchased or sold the securities during the alleged fraud conduct.[925]

As explained in the previous section, the platform as an intermediary must check the information and document of the offering. The equity crowdfunding regulation in the US requires the platform to take preventive action to protect investors from fraudulent offerings.[926] The intermediary must deny access of the issuer to the platform if there is a reasonable belief that 'the issuer or the offering presents the potential for fraud or otherwise raises concerns about investor protection'.[927] However, it should be remembered that an intermediary screening the offering imposes a cost. Therefore, it is important to align the interest of the intermediary and the process of screening. A lengthy and costly due diligence would not be practical.[928]

The role of the equity crowdfunding platform is central because the entire process of offering is through it, including putting the information from the issuer on its website. All communication between the issuer and investors use the platform's website, and the transaction is through the platform. Therefore, any fraud of an equity crowdfunding offering will almost always involve the platform.[929] Investors have to prove fraudulent statements or information based on electronic evidence from the platform's website or print-out of the electronic evidence.[930]

Assuming that all crowdfunding investors understand and are competent to make an informed decision after reading equity crowdfunding information or documents is not realistic. Small and unsophisticated investors are vulnerable to crowdfunding fraud

[923] Ibid.
[924] Ibid.
[925] Jennifer O'Hare, 'Retail Investor Remedies under Rule 10B-5' (2007) 76(2) *University of Cincinnati Law Review* 521, 529.
[926] Bradford (n 845) 1177.
[927] Ibid. See also *Crowdfunding* (n 855) § 227.301(c)(2).
[928] Bradford (n 845) 1180.
[929] Ibid 1194.
[930] Ibid 1195.

because their lack of financial knowledge means they may not recognize whether a crowdfunding offering is legitimate or a scam.[931] Lin argues that treating all investors as a homogenous group as opposed to a heterogeneous level of investors knowledge can create regulatory dissonance. Consequently, the regulator may expose unworkable rules for investor protection.[932] In general, retail investors have little understanding of basic financial knowledge, not to mention 'capital market and investing'.[933] A retail investor or individual investor is a term commonly used for 'any natural person who owns stock by any means, direct or indirect, and does not qualify as an accredited investor' under Rule 501 (a) of Regulation D.[934] Although a retail investor can be defined as opposed to an institutional investor, this thesis uses the term retail investor as those who do not qualify as an accredited investor.[935]

O'Hare explains the characteristic of retail investors in the US.[936] They are typically not 'knowledgeable about investing,' although this does not prevent them from being a direct holder of securities from the stock market. Most are passive traders who hold their stock for the long-term. Based on a 2004 survey, 50 percent of retail investors did not conduct transactions in the stock market while of the remainder 50 percent engaged in less than five transactions per year.

The effectiveness of anti-fraud provisions has been the subject of debate among scholars. Sigar claims that anti-fraud provision based on s17 of *the Securities Act*

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[931] James (n 903) 1779-80.

[932] Tom C. W. Lin, 'Reasonable Investor(s)' (2015) 95(2) *Boston University Law Review* 461, 464. Lin explains that reasonable investor can be understood from several perspectives:

> In terms of cognition, the reasonable investor is generally understood to be the idealized, perfectly rational actor of neoclassical economics. … In terms of activism, the reasonable investor is generally understood to be a passive, long-term investor. … In terms of wealth, the reasonable investor is generally understood to be a retail investor of average wealth and financial sophistication. … In terms of personage, the reasonable investor is generally understood to be a private human being.
>
> See Ibid 467.

[933] James (n 904) 1785. But see Jo Won, 'Jumpstart Regulation Crowdfunding: What Is Wrong and How to Fix It' (2018) 22(4) *Lewis & Clark Law Review* 1393, 1416. Jo Won argues that nonaccredited investors, overtime, become selective in choosing the project they want to fund. However, his argument is based on studies on non-equity crowdfunding projects (reward and donation crowdfunding) such as Kickstarter.com and Crowdcube.com, which have very different funders' expectation and interest concerning the project.

[934] Black (n 906) 303.

[935] O'Hare (n 925) 523.

[936] Ibid 525.

of 1933 and Rule 10b-5 under *the Exchange Act of 1934* 'not only deter people from committing fraud, but also instil public confidence in the market'.[937] However, Griffin notes that anti-fraud provisions only allow investors to bring an action after the fraudulent conduct occurs.[938] He asserts that while the registration requirement has been exempted in the equity crowdfunding offering, its function as a filter for fraudulent offerings has been disabled, significantly impacting on the level of protection for unaccredited investors.[939] He argues that this approach is flawed; the key to protecting investors is by requiring a registration statement to prevent any fraudulent offering being made, rather than cleaning up the mess afterwards using the anti-fraud provision.[940] Moreover, the plaintiff would have difficulty proving securities fraud because they need to show that the fraudulent actor 'had scienter, or intent to defraud'.[941] Even if the plaintiff could prove it, the cost of litigation would surpass the amount of recovered loss, making civil action uneconomical.[942]

Some crowdfunding platforms might argue that they will establish a solid SOP to prevent fraudulent offerings, because they are interested in maintaining their reputation. However, without investors' confidence in their collective reputation, 'any perception of market unfairness or distrust may have serious effects on investor confidence and investment behaviour'.[943] Consequently, investors will not invest in the crowdfunding market.[944]

Bradford argues that intermediaries should be held liable if there are one of three conditions present.[945] First, if the intermediary knows about the fraudulent information but does not stop access to the platform. Second, if the intermediary is aware of obvious potential fraud, but does not investigate it further, except where the cost of investigating is too high. Third, if the intermediary does not know 'any of the fraud' and

[937] Karina Sigar, 'Fret No More: Inapplicability of Crowdfunding Concerns in the Internet Age and the Jobs Act's Safeguards' (2012) 64 *Administrative Law Review* 473, 496.
[938] Griffin (n 609) 395.
[939] Ibid 394-5.
[940] Ibid 396.
[941] Ibid 397.
[942] Ibid.
[943] Heminway and Hoffman (n 85) 936.
[944] Ibid. See also Griffin (n 609) 404.
[945] C. Steven Bradford, 'Shooting the Messenger: The Liability of Crowdfunding Intermediaries for the Fraud of Others' (2014) 83 *University of Cincinnati Law Review* 371, 379-80.

has ‘no reason for suspicion’ but provides a recommendation to an investor without proper investigation.

7.6.2 Australia

In Australia, the regulatory guide explains that the Australian Securities and Investments Commission (ASIC) has no role in reviewing the CSEF offer document, since it is ‘not required to be lodged with ASIC’.[946] The issuer and the platform are required to ensure that the offer document complies with the law.[947] However, ASIC still has the power to seek corrective disclosure if it has concern about a defective offer document, such as the offer document not being presented in a ‘clear, concise and effective’ manner, or the CSEF offer not being eligible to be offered, based on the CSEF regulatory regime.[948] ASIC may exercise administrative powers, such as using its ‘stop order powers[949] or taking enforcement action’[950] such as suspending or revoking a platform’s licence [951].

The regulation has a quite detailed requirement for an equity crowdfunding platform to be a gatekeeper in an equity crowdfunding offering and anticipate fraudulent conduct. As the gatekeeper, it is required to check the issuer, its directors, and the CSEF offer document, check the investors’ eligibility, ‘holds investor money on trust’ and suspend or close an offer if the offer document is defective.[952] A template of a CSEF offer document is provided in the ASIC regulatory guide to illustrate what the content of a ‘clear, concise and effective’ CSEF offer document is expected to look like. It includes details about the risk warning, ‘information about the company’, ‘information about the

[946] *ASIC Regulatory Guide 261* (n 836) para 261.229.
[947] Ibid para 261.228.
[948] Ibid para 261.230, 261.232.
[949] In the Regulatory Guide, ASIC explains that:

> A stop order is an administrative mechanism that allows us to prevent the offer, issue, sale or transfer of securities under a disclosure document lodged with ASIC where, in our view: (a) the document contains a misleading or deceptive statement; (b) there has been an omission of information required to be provided under the legislation; (c) a new circumstance has arisen since the disclosure document has been lodged; or (d) the disclosure is not worded and presented in a clear, concise and effective manner.

See Australian Securities and Investments Commission, *ASIC Regulatory Guide 254: Offering Securities Under A Disclosure Document* (March 2016) para 254.331.
[950] *ASIC Regulatory Guide 261* (n 836) para 261.231, 261.233; Australian Securities and Investments Commission, *ASIC Information Sheet 151: ASIC’s Approach to Enforcement* (September 2013) p2.
[951] *ASIC Regulatory Guide 262* (n 856) para 262.193
[952] *ASIC Regulatory Guide 261* (n 836) para 261.7.

offer' and 'information about investor rights'.[953] The template helps any issuer to understand how to meet the regulation's expected requirement. However, ASIC cautions that it is only intended as 'a guidance tool' and encourages companies to present a CSEF offer document 'in a way that enhances the readability, accessibility, and digital compatibility of the document for retail investors'.[954]

7.6.3 Indonesia

In Indonesia, the equity crowdfunding regulation stipulates platforms must state on their website that: 'the issuer and the equity crowdfunding platform, either individually or jointly, [are] fully responsible concerning the truthfulness of all information included in the equity crowdfunding offering'.[955] There is no further explanation about this requirement. However, it is likely that the regulator considers the burden of responsibility for the accuracy and correctness of an offering document should be shared between the issuer and the platform. In practice, based on article 1365 of the Indonesian civil code, the effect is that any person who experiences loss because of the untruthfulness of information in an equity crowdfunding offering, may file a civil lawsuit in a district court. But there is no guidance concerning the extent to which each party or both parties would be liable. The basis of the lawsuit would be that the issuer or the platform had committed an act against the law [*perbuatan melawan hukum*]. There is no guidance for the court to determine to what extent the issuer or the platform can be categorized as liable.

It should be noted that the equity crowdfunding regulation stipulates that a securities offering via an equity crowdfunding platform is exempt from the requirement to file a registration statement, as defined by the Capital Market Law.[956] The regulation also states that violations can be subject to FSA administrative sanctions such as written admonitions, fines, restrictions on business activity, suspension of business activity, revocations of business licenses, cancellations or approvals, and/or cancellation of registration.[957]

[953] Ibid Appendix: Template CSF offer document.
[954] Ibid para 261.141.
[955] *Indonesian FSA Regulation on Equity Crowdfunding* (Indonesia) (n 11) article 23 c.
[956] Ibid article 5 (1).
[957] Ibid article 66.

The equity crowdfunding platform is categorized as a new type of service in the capital market and it is not regulated in a statute or law. Consequently, no criminal sanction in Capital Market Law can be applied to any violation of the equity crowdfunding regulation. In Indonesia, a criminal sanction can only be determined by a statute [law or *undang-undang*] or local government regulation. Any person can still file a criminal report to the police based on the accusation of fraud or embezzlement. However, it would be very difficult to differentiate between these types of criminal actions with a normal business loss that was caused by an issuer' business activity. If violation of the misstatement or fraudulent information in an equity crowdfunding offering is an offence against the Capital Market Law, the Indonesian FSA will have the authority to conduct a criminal investigation, and this can result in a more intensive criminal investigation.

Unfortunately, all the articles concerning criminal conduct in the Capital Market Law are unlikely to be applied to criminalize any violation of the equity crowdfunding regulation for the following reasons. First, the equity crowdfunding regulation in Indonesia excludes an equity crowdfunding offering from filing a registration statement which means that its activities are not defined by article 1 number 15 of the Capital Market Law. Moreover, the issuer in an equity crowdfunding offering is not categorized as a public company as defined by article 1 number 22 of the Capital Market Law, as long as the number of shareholders does not reach 300 and the paid-in capital does not exceed Rp3 billion (around A$300,000). Article 90[958] of the Law that criminalizes deceitful conduct, fraudulent conduct, and misstatement in any securities transaction, has been interpreted narrowly in the explanation of the article which states that:

> Buying and selling securities includes the offering of securities for sale in a Public Offering, offers to purchase or sell securities on a Securities Exchange, as well as offers

[958] *Law No. 8 of 1995 on Capital Market Law* (Indonesia) (n 20) article 90 states that:

> When buying and selling Securities, every Person is prohibited from directly or indirectly: a) defrauding or deceiving another Person, by any means or method; b) participating in a fraud or deception against another Person; and c) falsely stating Material Information or failing to disclose Material Information so that statements are misleading with respect to conditions at the time, either with the intent to obtain a benefit or to avoid a loss, either for himself or for another Person, or with the intent of influencing another Person to buy or sell Securities.

> to purchase or sell Securities of Issuers and Public Companies off of a Securities Exchange.

This means that article 90 (in conjunction with article 104[959]) of the Law does not apply to the equity crowdfunding offering and any securities transaction in relation to equity crowdfunding. Secondly, articles 91[960], 92[961], 93[962], 95[963], 96[964], and 97 (1)[965] (in conjunction with article 104) of the Capital Market Law are only applicable to any transaction in the stock market, any misconduct concerning undisclosed material facts that affect the price in the stock market, and insider trading in the stock market and the insider trading related with the securities of a public company or an issuer in a public offering.

7.6.4 Similarities and differences of Disclosure and Fraud Detection

The mechanism to prevent fraud in the US and Australia is very extensive and detailed compared to regulation in Indonesia. Since the issuer prepares the documents and information for offering, the regulation in both countries holds the issuer accountable

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[959] *Ibid* article 104. The article stipulates that: 'Any Person who violates the provisions of Articles 90, 91, 92, 93, 95, 96, 97 item (1) and 98, shall be subject to imprisonment for a maximum of ten years and a maximum fine of fifteen billion rupiah'.

[960] *Ibid* article 91. The article stipulates that: 'Every Person is prohibited from, directly or indirectly, taking any action that has the purpose of creating a false or misleading appearance of trading activity, market conditions or the price of Securities on a Securities Exchange'.

[961] *Ibid* article 92. The article stipulates that: 'Every Person, either alone or with others, with intent to influence others to buy, sell or hold Securities, is prohibited from making two or more Securities Transactions, that directly or indirectly cause the price of Securities on the Securities Exchange to rise, fall, or remain steady.'

[962] *Ibid* article 93. The article stipulates that:

> All Persons are prohibited from making, by any means, a statement and giving Material Information that is false or misleading and that affects the price of Securities on a Securities Exchange, if at the time of making such statement or giving such information: a) the Person knows or should have known that such Material Information was false or misleading; or b) the Person has failed to exercise due care in determining the truth of such statement or information.

[963] *Ibid* article 95. The article stipulates that: 'An insider with respect to an Issuer or Public Company, who is in possession of inside information, is prohibited from buying or selling Securities of: a) the Issuer or Public Company; or b) another Company engaged in transactions with the Issuer or Public Company'.

[964] *Ibid* article 96. The article stipulates that: 'The insider referred to in Article 95 is prohibited from: a) influencing a Person to buy or sell the Securities in question; or b) providing inside information to a Person he has reason to believe may use such information to buy or sell the Securities in question'.

[965] *Ibid* article 97 (1). The article stipulates that:

> 1. A Person that tries to obtain inside information[210] from an insider in violation of the law and who obtains such information, is subject to the same prohibitions as the insiders mentioned in Articles 95 and 96.
>
> 2. A Person who tries to obtain inside information and who obtains it without violating the law, is not subject to the prohibitions applicable to insiders mentioned in Articles 95 and 96, as long as such information is made available without restriction by the Issuer or Public Company.

for any misleading information or deceptive documents. The regulation in the US prohibits any misstatement materials or using a deceptive scheme in securities transactions and also applies to equity crowdfunding. It provides investors with a means to take action by filing claims through the court if there is any fraudulent conduct from the equity crowdfunding offering. Investors have the opportunity to recover the loss from their investment. The platform has to establish policies and SOP to meet the requirement of reasonable checking of information or documents of the offering, to escape this liability. Although ASIC has no access to the CSEF offering document in Australia since there is no requirement to lodge it, ASIC still can exercise administrative power to seek corrective disclosure if it found any defect in the offer document.

The regulation in the US puts the equity crowdfunding platform as an intermediary in the process of the offering and gatekeeping. The platform plays a crucial role in screening the document and conducting due diligence of the information and document provided by the issuer and has the power to ask more information if necessary to ensure that information provided to the investors is clear and reliable. It also has the power to stop the issuer from accessing the platform if it considers that the issuer does not meet the standard information and documentation required by the regulation. Even though there is no role for the regulator to review the documents, the regulation provides a mechanism for conducting the review, including the principles of its expected standard, such as ‘a reasonable basis checking’ in the US. In Australia, the regulation requires the CSEF platform to check the offer document and anticipate fraudulent conduct.

In contrast to the two abovementioned regulations, the Indonesian regulation puts the burden of responsibility on the issuer and the platform. However, it does not provide any guidance on the responsibility of the issuer and the platform to conduct checking or due diligence on the offer documents. In general, the platform is required to provide SOP to conduct its business. However, this requirement is still too broad to be used as the expected standard on how the platform should conduct the screening. The regulation also only provides that the platform must ‘conduct a review to the issuer’, without further explanation of what to expect from this review. This condition may put the burden on the platform and the issuer about to what extend the document or information should be disclosed and presented to the investors. In addition, investors only have recourse to article 1365 of the civil code or using the article concerning fraud and

embezzlement in the criminal code if there is an accusation of deceptive conduct or loss because of *perbuatan melawan hukum* [actions against the laws]. Without clear guidance about the standard of checking for the platform and the extent to which the offer document should be disclosed and presented, the two options for recovering losses from investors are unlikely to be effective.

7.7 Regulatory Requirements are Seen as Costly

The JOBS Act has been criticized for creating an unnecessary burden for many companies seeking to raise funds from an equity crowdfunding offering. The maximum yearly fund the issuer can collect is US$1 million (A$1.34 million).[966] Although the standard of disclosure requirement imposed on issuers has been reduced, it still provides a heavy burden for potential start-ups that might use the exemption.[967] As an illustration, Dibadj estimates that the initial cost for offering of $100,000 (A$134,000) or less is around $9,000-$14,000 (A$12,068-18,772) and $4,000 (A$5,363) for ongoing costs, while for offerings of more than $100,00-$500,000 (A$134,000-670,000), the initial cost is around $35,000-$65,000 (A$46,900-87,150) with the ongoing cost is more than $18,000 (A$24,000).[968] Many potential equity crowdfunding issuers could also see the JOBS Act as offering a very complex and costly process and high liability risk compared to other financing alternatives.[969] Hence, the regulatory purpose of protecting the investors should also consider the fund-seeker's interest in 'the overall cost of capital formation'.[970]

Some scholars consider that the burden of equity crowdfunding regulation in the US for most start-ups may be overstated. Following the enactment of the JOBS Act in 2012, the US SEC adopted the final rule on equity-based crowdfunding in late October 2015. A study by the SEC of crowdfunding market activities between May and December

[966] *The Jumpstart Our Business Startups Act* (n 824) § 302 (a).

[967] Skelton (n 823) 483-4. See also Imogene Boak, 'Deregulating the Unregulated Wild West of Today: How Title III of the Jobs Act Overlooks the Importance of Providing Regulations to an Unregulated Market before Allowing Equity Trading Comment' (2015) 3 *Business & Bankruptcy Law Journal* 174, 185; Joan MacLeod Heminway, 'How Congress Killed Investment Crowdfunding: A Tale of Political Pressure, Hasty Decisions, and Inexpert Judgments That Begs for a Happy Ending' (2013) 102 *Kentucky Law Journal* 865, 880-1.

[968] Reza Dibadj, 'Crowdfunding Delusions' (2015) 12 *Hastings Business Law Journal* 15, 29.

[969] Patricia H. Lee, 'Access to Capital or Just More Blues: Issuer Decision-Making Post SEC Crowdfunding Regulation' (2016) 18 *Transactions: The Tennessee Journal of Business Law* 19, 22, 39.

[970] Cody R. Friesz, 'Crowdfunding & Investor Education: Empowering Investors to Mitigate Risk & Prevent Fraud' (2015) 48 *Suffolk University Law Review* 131, 133.

2016 found there were 163 offerings by 153 issuers during that period[971] that sought an aggregate target of US$18 million (A$25 million), with the average target around $53,000 (A$74,000). Most of the offerings were oversubscribed, usually by around US$1 million (A$1.4 million). However, there were 24 withdrawn offerings because of the issuers' decision or termination of registration of the funding portal. The total target amount of funding from the withdrawal of equity crowdfunding was US$2.3 million (A$3.22 million). These figures show that the level of confidence among users of equity crowdfunding in the US is quite high, especially oversubscription from investors. This indicates the investors expected good quality start-up offerings via equity crowdfunding. One expert argues that although the cost of regulatory compliance as mandated by the JOBS Act is around US$40,000 (A$53,600) to 100,000 (A$134,000), the cost would not create a barrier for the industry in the long-term.[972]

Analysis of the real cost for issuers in using equity crowdfunding and the cost of meeting the regulatory requirements is hardly available in other countries. However, the US study illustrates how the real cost of meeting the standard required by regulation is one of the critical factors affecting the confidence of the start-up to use equity crowdfunding as an alternative source of capital.

7.8 The Conduct of Equity Crowdfunding Platforms in Checking the Equity Crowdfunding Offering Document

7.8.1 The US

The intermediary in an equity crowdfunding offering in the US must be a registered broker or funding portal.[973] The Securities Exchange Act 1934 defines a funding portal as:

> … any person acting as an intermediary in a transaction involving the offer or sale of securities for the account of others, solely pursuant to section 4 (6) of the Securities Act of 1933 (15 U.S.C. 77d(6)), that does not: (A) offer investment advice or recommendations; (B) solicit purchases, sales, or offers to buy the securities offered or displayed on its website or portal; (C) compensate employees, agents, or other persons for such solicitation or based on the sale of securities displayed or referenced on its website

[971] Vladimir Ivanov and Anzhela Knyazeva, 'U.S. Securities-Based Crowdfunding under Title III of the JOBS Act' (US SEC, Staff Paper, 2017) 1-5, 8.

[972] David J. Willbrand and Medha Kapil, 'Blurred Lines: Crowdfunding, Venture, Capital, and the Capitalization of Start-ups' (2014) 83 *University of Cincinnati Law Review* 505, 511.

[973] Skelton (n 823) 479. See also *the Jumpstart Our Business Startups Act* (n 824) § 302(a).

> or portal; (D) hold, manage, possess, or otherwise handle investor funds or securities; or (E) engage in such other activities as the Commission, by rule, determines appropriate.[974]

It should be noted that a funding portal has a similar requirement for accountability about providing information to the investors. An equity crowdfunding platform must ensure that the issuers comply with the requirement to provide certain information to investors on 'a reasonable basis'.[975] Under the SEC regulation, an equity crowdfunding platform is required to: (1) 'have a reasonable basis for believing that an issuer seeking to offer and sell securities' complies with the requirement to provide information for potential investors; (2) 'has a reasonable basis to believe that the issuer or the offering' does not present potential fraud and undermine the investors' protection; and (3) conduct the background check of the directors, officers and the holders of more than twenty percent of the issuers, and whose shares are to be offered.[976] In practice, the equity crowdfunding platform can use one or a combination of instruments to fulfil the obligation of a reasonable basis for checking the offering documents, such as in-house adviser, outside counsel, 'third-party service', and 'algorithmic methods of ascertaining inconsistent information to scrutinize issuers'.[977]

The reasonable basis doctrine requires that brokers or dealers conduct an adequate investigation about 'the company and its security' before giving any recommendation to customers and providing them with the material facts of the recommendation's basis.[978] The implementation of this doctrine depends on the circumstances of the underlying situation, rather than applying a single approach to interpret it.[979] For example, the New York Stock Exchange stated that one of the indications of a reasonable basis is the use of primary and secondary research sources.[980] The doctrine has been used more broadly by the US SEC to include 'opinions or

[974] *The Securities Exchange Act 1934*, 15 USC § 3(a)(80).
[975] *The Securities Act of 1933* (n 794) § 4A(b).
[976] *Crowdfunding* (n 855) § 227.301.
[977] Patrick Archambault, 'How the SEC's Crowdfunding Rules for Funding Portals Save the Two-Headed Snake: Drawing the Proper Balance between Integrity and Cost' (2016) 49 *Suffolk University Law Review* 61, 79.
[978] Gerald L. Fishman, 'Broker-Dealer Obligations to Customers--The NASD Suitability Rule' (1966) 51 *Minnesota Law Review* 233, 235.
[979] See Denis T. Rice, 'Recommendations by a Broker-Dealer: The Requirement for a Reasonable Basis' (1974) 25 *Mercer Law Review* 537, 574. See also Robert B. Martin, Jr., 'Broker-Dealer Manipulation of the Over-the-Counter Market - Toward a Reasonable Basis for Quotations' (1969) 25 *Business Lawyer (ABA)* 1463, 1470.
[980] Rice (n 979) 574.

prediction in certain contexts'.[981] The term reasonable investigation itself must also be interpreted on a case by case basis.[982] The SEC has extended the doctrine's application to include investment managers, since they have great influence than broker-dealers on their customers.[983] The US courts have interpreted the 'reasonable basis doctrine' to include all circumstances that 'reasonable investors would consider significant in [making] the decision to invest'[984] and rejected the argument that the sophistication of the customers cannot be used as a defence in providing a lower standard of recommendations.[985]

7.8.2 Australia

The ASIC Regulatory Guide clearly explains that an online platform, through which the company offers shares and investors invest money in exchange for shares, must hold the investor's money and pass it to the company when the offer is complete'.[986] The regulatory guide also provides the following figure to show how the equity crowdfunding works.[987]

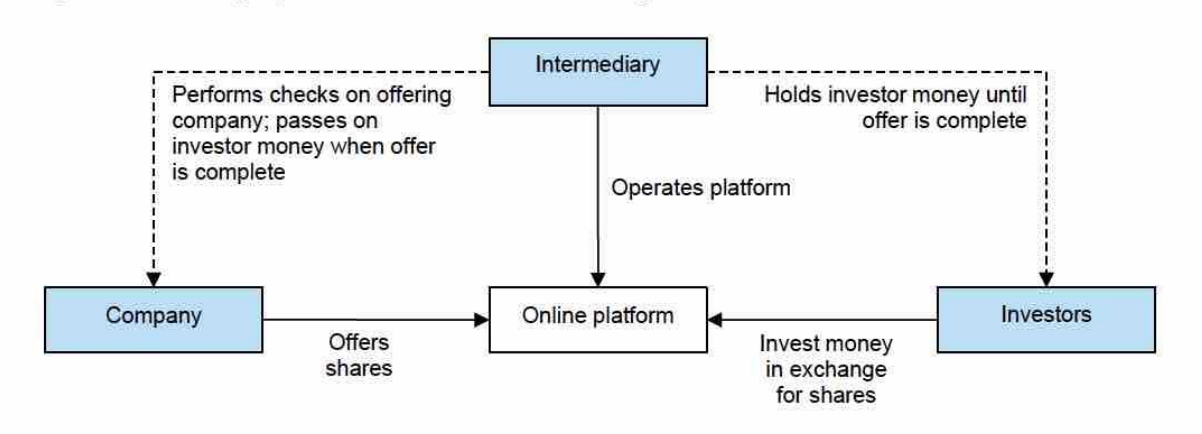

Figure 7.1: How equity crowdfunding works in Australia

Source: ASIC RG 261

The Australia's regulation concerning the broker-dealer duties differs from the US regulation. It does not use the reasonable basis doctrine. Instead, it uses more

[981] Ibid 539.
[982] Ibid 554.
[983] Harvey E. Bines, 'Modern Portfolio Theory and Investment Management Law: Refinement of Legal Doctrine' (1976) 76 *Columbia Law Review* 721, 783.
[984] Dan R. Waller and Wayne M. Secore, 'Securities Law Survey: Securities Law' (1995) 26 *Texas Tech Law Review* 741, 758.
[985] Matthew J. Benson, 'Online Investing and the Suitability Obligations of Brokers and Broker-Dealers' (2000) 34 *Suffolk University Law Review* 395, 404.
[986] *ASIC Regulatory Guide 261* (n 836) para 261.2.
[987] Ibid.

regulation for customer protection by imposing 'fiduciary or best interest duties' which differ from the general fiduciary doctrine that imposes the 'conflict avoidance standard'.[988] Tuch explains that fiduciary doctrine concerning the conduct of business regulation (COB) originates from general law,[989] stating that:

> Under general law, a financial intermediary providing financial products and services may face liability for fraud and for carelessness and disloyalty. Liability for fraud arises where the tort of deceit is committed. Liability for carelessness arises from breach of a duty of care imposed by contract or the tort of negligence. Liability for disloyalty arises from breach of a duty of loyalty, a duty arising where the financial intermediary–client relationship is characterized as fiduciary…. fiduciary doctrine has traditionally required fiduciaries to avoid conflicts of interest, absent the informed consent of the party to whom the duty is owed.[990]

However, the general law adapts too slowly and does not provide a 'mechanism for public enforcement'.[991] Therefore, COB regulation specifies more detail to anticipate the rapidly changing market practices and facilitates regulatory intervention to protect small investors.[992] The main strategies of COB regulation are 'anti-fraud rules and duties of care, loyalty, fair dealing, and best execution—as well as variants of these duties'.[993] These strategies are also accompanied by licensing requirements and law enforcement mechanisms to impose duties.[994]

Equity crowdfunding regulation in Australia requires the platform to conduct 'the prescribed checks to a reasonable standard'.[995] The platform must check an equity crowdfunding offer document before publishing it.[996] It must check the facts about the company's identity, the directors and the officers, and ensure that they are not engaged in misleading or deceptive conduct, as well as check that the offer document does not contain misleading or deceptive statements.[997] ASIC provides guidance in its registers or website about the meaning of 'a reasonable standard' to include checking information of

[988] Andrew Tuch, 'Conduct of Business Regulation' in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (Oxford University Press, 2015) 538, 558.
[989] Ibid 540.
[990] Ibid 541.
[991] Ibid.
[992] Ibid.
[993] Ibid 544.
[994] Ibid.
[995] *Crowd-sourced Funding Act 2017* (Cth) (n 810) s 738Q(1).
[996] Ibid.
[997] Ibid s 738Q(5), (6).

a company's financial statement. However, this checking guide should not be considered a comprehensive list.[998]

The ASIC regulatory guide also explains the standard of the platform's conduct if its registers or website do not provide the information the platform requires to conduct checking of the offer document.[999] The platform must ask the issuer to explain in writing the matters in 'accordance with a reasonable process' that the equity crowdfunding platform has developed. The meaning of 'a reasonable process' depends on the circumstances and the level of complexity of the issuer's business. However, the platform does not need a comprehensive review of 'all relevant available information'. It should consider that the expense of time and cost is proportionate with 'the materiality of the matter and the extent of the risk that is apparent from the information provided'.

7.8.3 Indonesia

The reasonable basis is not unknown in Indonesian FSA Regulation. The Regulation on the Conduct of an Investment Manager includes the term reasonable basis [*alasan yang rasional*].[1000] Article 18 states that investment managers have to use a reasonable basis to implement any investment policy, provide investment recommendations, and make an investment decision for their customers. However, there is no further explanation or guidance concerning what constitutes a reasonable basis. In addition, the FSA regulation concerning the conduct of broker-dealers requires them to consider the financial condition and investment purpose of their customers before giving recommendations to sell or buy securities.[1001] The broker-dealers must also inform a customer whether they have any interest in the recommended securities.[1002] This regulation does not provide any further explanation about broker-dealer conduct concerning this requirement.

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[998] *ASIC Regulatory Guide 262* (n 856) para 262.134, 136, 137.

[999] Ibid para 262.138-141; *Corporations Act 2001* (Cth) (n 836) s 6D.3A.09.

[1000] See *Peraturan OJK No. 43/POJK.04/2015 tentang Pedoman Perilaku Manajer Investasi [Indonesian FSA Regulation No. 43/POJK.04/2015 on the Conduct of Investment Managers]'* (Indonesia) article 18.

[1001] *Peraturan OJK No. 3/POJK.04/2020 tentang Perilaku Perusahaan Efek Yang Melakukan Kegiatan Usaha Sebagai Perantara Pedagang Efek [Indonesian FSA Regulation No. 3/POJK.04/2020 on the Conduct of Broker-Dealers]* (Indonesia) articles 3, 6.

[1002] Ibid article 4.

In Indonesia, an equity crowdfunding platform [*Penyelenggara Layanan*] is defined as an entity that provides, manages, and operates equity crowdfunding.[1003] Equity crowdfunding [*Layanan Urun Dana Melalui Penawaran Saham Berbasis Teknologi Informasi*] defined as a service for an issuer to offer shares directly to investors through an open network of an electronic system.[1004] The regulation does not state that an equity crowdfunding platform is an intermediary, only that it requires a license from the FSA and must be registered in the electronic platform system of the government agency responsible for communication and information.[1005] The platform's legal entity can be a limited liability company or a co-operative that engages in the business of service.[1006] The platform may not have other business activities other than being an underwriter, broker-dealer, or investment manager.[1007] Although the regulation does not state that the equity crowdfunding platform is a new type of financial service, its definition and requirements are categorized as financial services in the capital market sector.[1008] The regulation requires the platform to review any document or information filed by an issuer, and to review the legality of the company, the legal aspects of the capital raising, limitation of the issuer, and any license of the issuer.[1009]

7.8.4 Similarities and differences of regulations on platforms

The similarity between equity crowdfunding regulation in Indonesia, the US and Australia in relation to the platform is that it must be registered or have a license from an authority. The difference is that in the US and Australia, an equity crowdfunding platform is defined as an intermediary, while in Indonesia it is not an intermediary. The regulation in Indonesia only explains that an offering of shares must be conducted through an open network of an electronic system which the platform provides, operates, and manages. The basic function of an equity crowdfunding platform is different in Indonesia compared with Australia and the US, and this influences its conduct, as explained below.

The platform is required to check information or documents from issuers for an equity crowdfunding offering. However, the difference between the regulations in

[1003] *Indonesian FSA Regulation on Equity Crowdfunding* (Indonesia) (n11) article 1 number 4.
[1004] Ibid article 1 number 1.
[1005] Ibid Article 7, 8.
[1006] Ibid article 10.
[1007] Ibid.
[1008] Ibid article 4.
[1009] Ibid article 16 (1) a.

these three countries is in the detail of how to do the checking. The US tends to be more principle-based and uses the reasonable basis doctrine for the conduct of the equity crowdfunding platform; the platform must conduct an adequate investigation, although the implementation of the doctrine depends on the circumstances. Australia uses a combination of principle-based and more prescriptive regulation. The equity crowdfunding platform must conduct 'the prescribed checks to a reasonable standard'. This principle is accompanied by more detailed regulation such as providing guidance on how to implement the principle, including checking the financial statement of the equity crowdfunding offering document in the ASIC register. Indonesia has a brief explanation of how a platform should check equity crowdfunding offering information or documents. The wording of the FSA regulation only uses 'review' without further explanation of the extent to which the review will be conducted. This may raise concern about how the review process should be conducted. Although one may argue that the FSA regulation requires the platform to prepare a standard operating procedure (SOP), the level of uncertainty is still high, and will create differences of opinion and expectation between the regulator, platforms, issuers and investors on how the conduct will be applied in practice.

The other difference is how the regulations in Australia and the US require the equity crowdfunding platform to conduct checking of the offering information and documents based on the context and level of complexity of the issuers' business. The US regulation requires the platform to assess if the information and documents present potential fraud and discredit investor protection. The Australian requires the platform to ensure the information and documents do not present misleading or deceptive statements. Although the wording of the regulation differs between the two countries, the result of the requirement can be the same; that is, to ensure that equity crowdfunding platforms check the information and documents in a manner that a reasonable investor would consider significant in making the decision to invest. In Indonesia, the equity crowdfunding regulation does not include this requirement. It only requires the platform to conduct a review of the issuer's legal status, the information and document they provided. This requirement does not encourage a platform to check the issuer's documents and information to ensure that they are adequate for investors to make a sound investment decision. Consequently, the platform may argue that it has fulfilled its duty to

review, without crosschecking to primary or secondary sources such as the companies' register website in the Directorate General of General Law Administration [*Direktorat Jenderal Administrasi Hukum Umum*].

Chapter 8 : Discussion

This chapter discusses the research findings presented in the previous chapters. Consistent with thematic analysis, as explained by Braun and Clark [1010], this is the sixth stage of analysis. The purpose is to analyse the key themes in the findings chapter.

This chapter interprets the findings and examines to what extent they have answered the research questions; relates these findings to the functional approach in comparative law and theories identified in the literature review and investigates how regulation of equity crowdfunding in other countries approaches similar issues found in the research findings. Therefore, this study is based on a 'concrete problem' and focuses on the discussion of the regulation based on empirical data, without excluding particular characteristics in the Indonesian context. Without a certain degree of similarity in the facts, it is difficult to find comparability, and even more difficult to find which solution applies to the problem. This comparability of the facts, 'in the sense that they relate to functionally equivalent rules, provisions or institutions', is the basis of 'functional-institutional approach' in comparative law.[1011]

8.1 The Perceived Advantages of the Equity Crowdfunding

The findings of this study indicate that participants saw several advantages of equity crowdfunding. These were: providing funding for start-ups, investment for more people, and a positive contribution to the economy. These findings are consistent with other studies. Crowdfunding has broadened the connection between investors and fund seekers because the internet facilitates new communication methods between the two parties,[1012] thus overcoming the problem of distance between widely spread investors and the entrepreneurs who seek funding.[1013] Equity crowdfunding has been used as a simple and shorter process[1014] of seed capital funding for start-ups.[1015]

[1010] Braun and Clarke (n 692) 87-93.
[1011] Örücü (n 779) 29.
[1012] Agrawal, Catalini and Goldfarb (n 94) 63.
[1013] Vulkan, Åstebro and Sierra (n 93) 38.; Agrawal, Catalini and Goldfarb (n 125) 271.
[1014] Vulkan, Åstebro and Sierra (n 93) 47.
[1015] Tomczak and Brem (n 25) 382.; Belleflamme, Omrani and Peitz (n 1) 13.

These findings may provide evidence to boost development of equity crowdfunding in Indonesia, since it can have benefits for the Indonesian economy and more specifically for providing funding for start-ups. It offers fundamental support to build confidence for all equity crowdfunding stakeholders. The findings should also reassure policymakers in Indonesia of the potential advantages of equity crowdfunding.[1016]

8.2 The Availability of Capital from Domestic Angel Investor and Venture Capital in Indonesia is Limited

The findings in this study suggest that venture capital development in Indonesia is immature. Domestic venture capital was unable to significantly increase the amount of managed funds under the current regulatory regime. The investment environment has caused liquidity constraint that has forced many venture capitalists to be very selective about investing in start-up companies and instead use their funds to finance productive business activities.

According to the Indonesian FSA Regulation[1017], venture capital companies are permitted to take share ownership to acquire equity participation, take convertible bonds (quasi-equity participation), buy debt securities from its investee company at the start-up stage, or provide business financing. Since the venture capital's source of funds is mostly banks, it tends to focus on short-term business activities such as productive business financing. In practice, productive business financing is a loan to provide capital for the partner company, which then uses it to produce goods or services to increase income. The partner company has to return the loan within an agreed time frame.[1018]

The literature suggests that the business of venture capital is primarily taking equity participation or equity-linked investment in 'young growth-oriented ventures' and usually becoming a partner as a minority shareholder for around 5-10 years, and then taking capital gain through exiting from the investment rather than relying on dividend

[1016] Corporations and Markets Advisory Committee (n 118) 6.

[1017] See *Peraturan OJK No. 35/POJK.05/2015 tentang Penyelenggaraan Usaha Perusahaan Modal Ventura [Indonesia FSA Regulation on Business Activities of Venture Capital Companies]* (Indonesia) article 2.

[1018] See Bahana Artha Ventura, 'Pembiayaan Usaha Produktif [Productive Business Financing]' <https://www.bahanaventura.com/pembiayaan-usaha-produktif/>.

income.[1019] However, the findings in this thesis suggest that venture capital in Indonesia was inconsistent with the literature. Many venture capital businesses, due to unsupportive capital sources and legal frameworks, have adapted to provide business financing. Some participants reported that several domestic venture capitalists had started to offer share participation funding for start-up companies and provided business incubators with support for the development of start-up companies. However, other participants argued that many venture capitalists had shifted their strategy from providing funding to seed-stage companies to focusing on later stage development of start-up companies. This shift in strategy reflects a similar tendency in other countries.[1020]

The results of this study reflect Scheela et al.'s findings that most venture capitalists in developing countries are 'young and undeveloped', due to a 'lack of fully developed legal and financial institutions'.[1021] Moreover, most developing countries have a weak institutional, regulatory framework and venture capital culture to support such businesses.[1022] There are similarities between the conditions of venture capital in Indonesia compared to some other developing countries.

However, this study reveals other reasons why venture capital is underdeveloped in Indonesia, which are outlined as follows. Firstly, the funding sources of venture capitalists are mostly banks, either as paid-in capital or short-term finance. In other words, venture capital is an instrument of a bank designed to invest in companies, through direct ownership of the venture capital, or to channel venture capital funded from the banks. The effect is that most venture capitals tend to use their funds for short-term business purposes and are not suitable for start-up funding that needs long-term investment.

Secondly, the 2015 Indonesian FSA regulation concerning the Venture Fund has not been effective in increasing the number of funds managed by venture capital which is mostly not interested in this scheme. Nor has it been effective in encouraging more investment in the venture fund. Thirdly, the tax regime discourages domestic or foreign investors from investing in domestic venture capital. The tax regulation has

[1019] Landstrom (n 626) 5; Capizzi and Carluccio (n 104) 126-127.
[1020] See Hellmann and Thiele (n 150) 639.
[1021] Scheela et al (n 627) 608.
[1022] Landstrom (n 626) 14.

caused investors to pay double or even triple taxation because they have to pay tax more than once on the same income. It is safe to conclude that the investment climate and regulatory framework do not provide appropriate support for the development of domestic venture capital.

The findings in this study suggest that most people in Indonesia do not know about angel investors. The perceptions of participants about their presence in Indonesia varied. Some believed that access to funding from angel investors was available, but others did not know about them. The lack of data and any studies about the role of angel investors in Indonesia in providing capital for start-up funding means that discussion of this topic is limited. These findings are consistent with a previous study of angel investors in developing countries that found they are still at an early stage due to the poor investment climate, and lack of transparency, and minority shareholder protection.[1023]

The situation of venture capital and angel investors in Indonesia in relation to funding for start-ups and SMEs, as explained above, is far from ideal compared to many developed countries. Equity crowdfunding is not stand-alone funding but relates to other sources of funding. It can be used as a steppingstone to obtaining other funding[1024] from angel investor and venture capital. According to the start-up stage of funding, after the seed stage SMEs tend to develop to the start-up stage and then to the later stage.[1025] The under-developed condition of venture capital and angel investors in Indonesia means that even though start-ups can use equity crowdfunding, few will receive further funding from angel investors or venture capital. A previous study in Germany found that without follow up funding from venture capital, investors in equity crowdfunding projects have little opportunity to exit early from their investment.[1026] Similarly, an exit strategy for equity crowdfunding investors in Indonesia from acquisition or IPO to gaining profit from their investment will be less likely to occur because the start-ups are unlikely to obtain follow-up funding from angel investors and venture capitalists. This condition may discourage potential investors in Indonesia from participating in equity crowdfunding.

[1023] See Scheela and Isidro (n 168) 53; Romani and Atienza (n 173) 290.
[1024] Belleflamme, Omrani and Peitz (n 1) 13.
[1025] Capizzi and Carluccio (n 104) 119.
[1026] Tuomi and Harrison (n 78) 611.

8.3 The Role of Foreign Angel Investors and Foreign Venture Capital in Indonesia was significantly affected by the domestic funding market for start-ups

Many participants in this study perceived foreign venture capitalists and angel investors as playing a crucial role in Indonesia's start-up funding environment. The investment climate provided significant opportunities for foreign investors, including angel investors and venture capitalists, to invest in Indonesia. One possible explanation for this finding is that foreign angel investors and venture capitalists in Indonesia have used active networking with local investors as a strategy to adapt to local conditions.[1027]

Some participants perceived foreign angel investors and venture capitalists as having more expertise, competency, and proficiency in making investment decisions in start-ups. Their experience helped them to predict if what worked well and was profitable in their home countries would work in Indonesia. They could predict the next trend in the digital start-up industry. Their experience was valuable in developing a positive funding environment for start-ups and building Indonesia's venture culture. Therefore, regulation of equity crowdfunding should encourage their role in equity crowdfunding investment. This regulation would be more effective if the regulator considered the various actors who play their part in the start-ups funding environment.[1028]

Several studies have indicated that there is a growing interest in combining the expertise of angel investors and the crowd to jointly invest in equity crowdfunding. Instead of only investing in start-ups through private investment, individual angel investors or a syndicate of angel investors with venture capital, have collaborated to play an active role in equity crowdfunding. Their primary roles as lead investors are to conduct due diligence and monitor the start-ups.[1029] Their expertise in investing in seed-stage ventures has improved the crowd's confidence in investing through equity crowdfunding.[1030] Therefore, the more respected the lead investors who invest through the equity crowdfunding platform are, the more attractive the platform will be for many investors and entrepreneurs.[1031]

[1027] Scheela and Isidro (n 168) 53.
[1028] Capizzi and Carluccio (n 104) 154.
[1029] Agrawal, Catalini and Goldfarb (n 616) 117.
[1030] Ibid 120.
[1031] Ibid.

In Indonesia, the investment cap for investors who have less than Rp500 million (A$ 50,000) is a maximum of five percent of income (A$2,500), and the investment cap for those who have income of more than Rp500 million (A$ 50,000) is ten percent of income (A$5,000). One of the exceptions is that the investment cap is not applicable for a legal entity and people with investment experience in the capital market, which is defined as having a securities account at least two years before the equity crowdfunding offering.

While the amount of fund provided by angel investors is around £100,000 (A$180,000) in the UK[1032] and around US$500,000 (A$700,000) in the US,[1033] the result of this study shows that in Indonesia the amount is between A$50,000 and A$300,000 which potentially inhibits the role of angel investors in acting as a lead investor in equity crowdfunding for several reasons. First, angel investors are typically individuals rather than a legal entity who have a high net worth and invest their own money[1034]. Second, their expertise is typically investing in an early-stage business [1035]; it does not necessarily relate to expertise in the securities market. Third, investment in equity crowdfunding is high-risk because of information asymmetry and agency costs, lack of transparency, business failure and fraud,[1036] which is very different from investment in the securities market. Providing a securities account as required by the current regulation does not mean that typical securities market investors can cope with the high-risk investment of equity crowdfunding. In contrast, an angel investor is typically a sophisticated investor with expertise in managing the risk of investment in early-stage capital and tends to provide higher capital.

Therefore, the provision concerning the exception of an investment cap in Indonesia should be changed to facilitate lead or syndicate investors participating in equity crowdfunding. The role of lead investors can be crucial to control agency costs during the process of investment such as due diligence, contractual arrangement, and post monitoring.[1037] It would be more effective if the investment cap exception was aimed at investors with expertise in seed-stage investment and capacity in terms of assets, financial

[1032] Collins and Pierrakis (n 162) 17.
[1033] Pope (n 161) 995.
[1034] Capizzi and Carluccio (n 104) 126-7.
[1035] Ibid; Hooghiemstra and Buysere (n 107) 136.
[1036] Gabison (n 639) 20; Kirby and Worner (n 139) 23-7.
[1037] See Osnabrugge (n 625) 97, 100.

sophistication, knowledge, and experience,[1038] to manage the risk of investment in this area. Australian regulation could be considered here. The investment cap in Australia is only applicable to retail investors [1039] and not to wholesale or sophisticated investors.[1040] The Australian model does not prevent any lead investors from participating in equity crowdfunding.

8.4 Available sources of funding for start-ups in Indonesia

The findings in this study suggest that start-ups in Indonesia perceived that borrowing from banks or P2P lending as a source of capital was not a suitable option for funding because they do not want to return the interest and loan principal while still in the early stage of development. Even if they take a loan, they will use it only temporarily. This finding is inconsistent with a study that found that start-ups use bank lending, although its cost was considered high.[1041] The start-ups require the loan for capital at the early stage of their business and use bank loans as their first choice.[1042] In the US, start-ups use business credit cards for capital under US$35,000 (A$49,000) and unsecured credit lines provided by banks, as long as they have a good personal credit history.[1043]

Several entrepreneurs in this study explained that they started their business using their own savings or accumulated fund from previous jobs. After that, some borrowed money from friends or sought finance from angel investors and venture capitalists. Therefore, the source of funding in Indonesia is similar to that in the literature[1044], except that banks are not an option for funding most start-ups. This condition is not ideal because if the choice between equity and debt capital is related to the growth of early-stage companies[1045], the unavailability of funding from the banks may hamper the companies' growth.

[1038] Easley and O'hara (n 582) 523.

[1039] *Crowd-sourced Funding Act 2017* (Cth) (n 810) s738ZC(1)(b).

[1040] For the definition of retail investors and wholesale client in Australia see *Corporations Act 2001* (Cth) (n 836) ss 761G, 761GA. These provisions also stipulate that a wholesale client is not a person who is a retail client.

[1041] Maurizio La, Tiziana La and Alfio (n 594) 127.

[1042] Hirsch and Walz (n 591); Maurizio La, Tiziana La and Alfio (n 594) 127.

[1043] Connie Shepherd, 'Financing Sources for Start-up Businesses' (2002) 46(6) *Indiana Business Magazine* 8, 8.

[1044] Berger and Udell (n 595) 623.

[1045] See Cosh, Cumming,and Hughes (n 592) 1497; La Rocca, La Rocca and Cariola (n 594) 127; Beger and Udell (n 595) 623.

Based on the findings in this study, the stage of funding in Indonesia can be illustrated on the Figure 8.1 below.

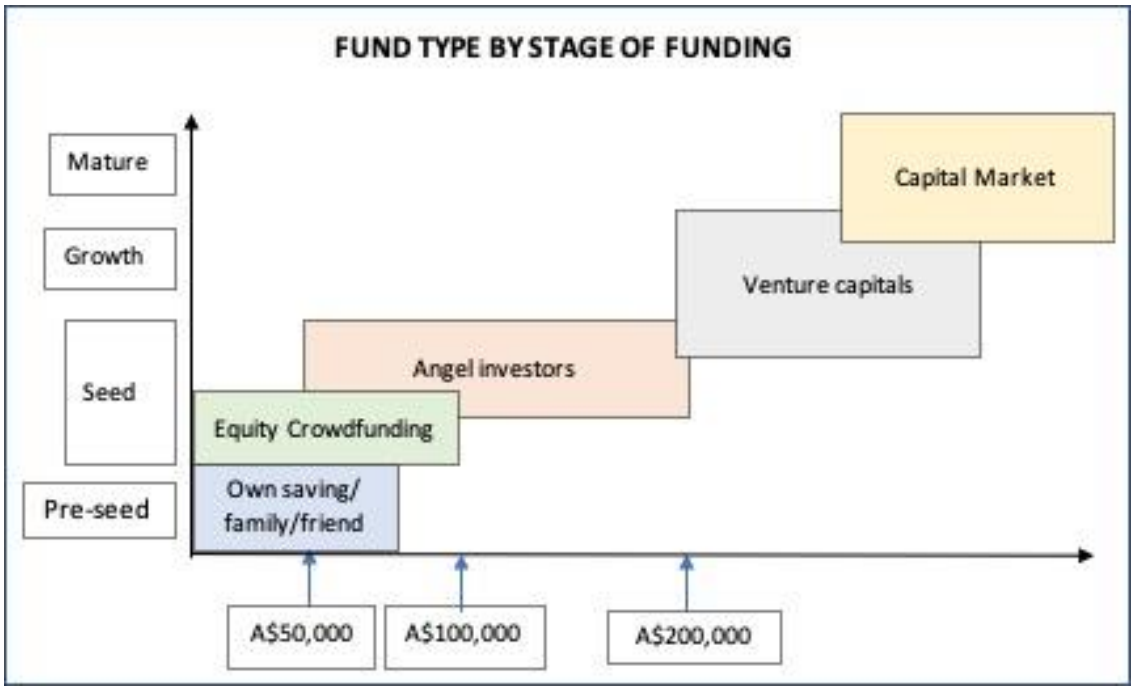

Figure 8.1: Fund type by stage of funding in Indonesia

In the US, concern about the cost for start-ups of using equity crowdfunding has been the subject of discussion.[1046] The regulation's effect at the level of implementation has also been assessed by the SEC to ensure that the real cost is accessible for most start-ups and does not deter equity crowdfunding.[1047] This is an effective instrument for ensuring that regulation has addressed the problem and applicability at the implementation stage. There are few studies outside the US on this topic. Baldwin suggested that regulators need to assess the performance of the regulation because circumstances may change over time.[1048] In addition, its effect should also be scrutinized to understand whether it improves the performance of the business and prevents unwanted consequences.[1049] To ensure that the regulation on equity crowdfunding in Indonesia is effective, more studies from scholars or regulators are required to determine any burdens

[1046] See Skelton (n 823) 483-4; Joan MacLeod Heminway, 'How Congress Killed Investment Crowdfunding: A Tale of Political Pressure, Hasty Decisions, and Inexpert Judgments That Begs for a Happy Ending' (2013) 102 *Kentucky Law Journal* 865, 880-1; Boak (n 967) 185; Dibadj (n 968) 50; Lee (n 969) 39; Friesz (n 970) 133.

[1047] Ivanov and Knyazeva (n 971) 8; Willbrand and Kapil (n 972) 511.

[1048] Baldwin, Cave and Lodge (n 191) 132.

[1049] Kitching (n 233) 810.

in implementation, both in terms of the cost and process. Otherwise, equity crowdfunding regulation in Indonesia may not provide significant impact to start-up funding in the implementation stage and has not addressed the real problem as suggested by Pistor et al. and Aldashev.[1050]

8.5 Different Perspectives on the Role of Equity Crowdfunding as an Alternative Source of Funding

The findings in this study reveal that in terms of the stages of funding, potential users, in this case start-ups, will have the confidence to access equity crowdfunding if it can provide sufficient funding for the star-ups. Whether or not start-ups think the funding is insufficient depends on their accessing and combining funding from other sources such as angel investors and venture capitalists. The maximum amount of Rp10 billion under the current FSA regulation may support some of the start-ups for seed funding or even for development stage funding. However, for some other participants, this limitation needed to be combined with other sources of external funding to support the capital needs of start-ups.

Based on the findings in this study, to increase confidence of start-ups in using equity crowdfunding, the regulation in Indonesia should consider the position of equity crowdfunding in the start-up stage. The challenge for regulation is to determine the fund-raising cap that is suitable for most start-ups. The amount of seed funding needed can vary depending on the industry and the scale of the start-up companies. Some participants reported that start-ups in financial technology usually needed more funding because of high investment in technology and skilled employees. If the fundraising cap was too low, big start-up companies were unlikely to be interested in using equity crowdfunding. However, if it was too high, the start-up companies would consider whether the requirements to access equity crowdfunding were more difficult than other funding options such as venture capital and banks, and it might cause regulatory arbitrage that was unhealthy for the overall source of funding. In this case, rather than an alternative of funding, equity crowdfunding could compete with other sources of funding since the required documentation may be less demanding.

[1050] See Pistor, Raiser and Gelfer (n 382) 348; Aldashev (n 387) 261.

Based on the findings in this study, participants perceived that equity crowdfunding was expected to support Indonesian start-ups and fill the funding gap, from other sources of external funding for start-up companies. On the other hand, some participants explained that many venture capitalists in Indonesia have moved away from seed funding and focused more on venture capital funding to reduce risk. Thus, start-up companies have to compete to obtain seed funding from angel investors. While there are fewer angel investors in Indonesia than in developed countries, the seed funding gap is potentially increasing. This situation can create a high demand for funding from start-ups and force them to work harder to obtain available funding sources.

This finding reveals that some participants believe that access to capital for their start-up is available from any domestic or international investor who sometimes needs to establish a holding company in Singapore or Hong Kong as part of the investment deal. Consequently, the start-up company in Indonesia acts merely as an operational company.

This finding indicates that most businesspeople will assess whether domestic regulations can accommodate their business interests and look for better options to develop their business. While one might consider nationalism is important, in the real-world business competition has always been global and national boundaries for business activities have become less defined. Policymakers should understand that this is a significant challenge that they must consider.

LLSV maintain that the entrepreneurs' preference when choosing between equity or debt finance depends on which of these two options is better for obtaining external finance.[1051] They explain that the terms for equity finance are 'reflected by valuation relative to the underlying cashflows', while for debt finance they are 'reflected by the cost of funds'. Hence, an entrepreneur would prefer to sell his equity stake if the terms are better than the cost of funds for taking debt finance. Therefore, they assert that[1052]:

[1051] Rafael La Porta et al, 'Legal Determinants of External Finance' (1997) 52(3) *The Journal of Finance* 1131, 1132.

[1052] Ibid.

> Countries whose financial systems offer entrepreneurs better terms of external finance would then have both higher valuations of securities and broader capital markets in the sense that more firms would access them.

The findings in this study are consistent with LLSV's argument. Most entrepreneurs will compare the opportunity provided by the equity crowdfunding regulation with other available funding options and the cost of obtaining funding. In making the comparison, they perceived there was a trade-off between the information they had to disclose to the public, the cost of meeting regulatory requirements, and the potential funds they would obtain.

8.6 Disclosed Information to Reduce Information Asymmetry in equity crowdfunding

This study found different perspectives about the information that should be disclosed to potential investors to allow them to make a well-informed investment decision in equity crowdfunding. Most participants explained that the information to be disclosed depended on the level of the start-up. For example, start-ups at the idea stage should disclose their idea and clearly explain 'what is the problem they want to solve' and how this affects society, the solution, and the potential market. Others thought that start-ups should disclose their financial condition, financial projection, business plan, product, and background. Therefore, regulation should not only require start-ups to disclose standardized, detailed, and specific information since it could produce a misguided investors' investment decision.

Regulations in the US, Australia, and Indonesia have similarities in terms of the minimum information that should be disclosed in an offer document. However, there is a significant difference between regulation in the US and Australia compared to Indonesia. In the US and Australia, the regulation sets the minimum information that should be displayed on the platform's website. However, an issuer is also required to provide information to enable investors to make an investment decision. In the US, there is a prohibition on a person who offers or sells a security making 'an untrue statement of a material fact or omits to state a material fact required to be stated or necessary to make the statements' or misleading the purchaser. In Australian regulatory guide, there is a requirement for the issuer to present the offer document in a 'clear, concise, and effective'

manner.[1053] However, in Indonesia, this type of provision is unknown. The regulation only states the minimum requirement of information and documents that should be disclosed.[1054] In addition, the Australian regulatory guide provides an example of an offer document to illustrate the requirements of being 'clear, concise and effective'.[1055]

In Indonesia, the start-up submits to the equity crowdfunding platform all required documents. Article 35 subsection (1) of the FSA regulation on equity crowdfunding requires the issuer to submit documents or information concerning: the certificate of the establishment of the limited liability company, the amount of fundraising, the main risks to the issuers including the possibility of illiquidity of the shares offered, the business plan, any licenses, the dividend policy, the financial report, and the mechanism to determine the share price. Later, according to article 16, the platform should review the documents and information from the issuers, review the issuers, and display the documents and information on the platforms' website.

The findings in this study suggest that there is potentially a large gap between the expectations of participants about information needed to make a sound investment decision and the level and circumstance of start-ups. If an issuer and a platform implement article 35 subsection (1) of the FSA regulation on equity crowdfunding, even though they meet the requirement, the information may not satisfy the users' needs. Consequently, investor confidence will be discouraged because they may believe that the required information is not available[1056] and the problem of undisclosed information remains.[1057]

This study has found that information that disclosed in equity crowdfunding varied, depending on the stage of the start-up's development. Those at the idea stage provided information differently to those at the product development stage. Providing minimum information to investors concerning a start-up might prevent investors from making sound investment decisions. These conditions potentially do not provide confidence to retail investors because the current mechanism does not solve 'the lemon problem'. Therefore, this condition is inconsistent with the literature which suggests that

[1053] *ASIC Regulatory Guide 261* (n 836) para 261.230, 261.232.
[1054] *Indonesian FSA Regulation on Equity Crowdfunding* (Indonesia) (n 11) articles 16(1)b, 35(1).
[1055] *ASIC Regulatory Guide 261* (n 836) Appendix: Template CSF offer document.
[1056] Black (n 906) 337.
[1057] Pichler and Tezza (n 48) 14.

information asymmetry in equity crowdfunding should be reduced to ensure trust between entrepreneurs and investors, so that the market can works efficiently.[1058]

Nevertheless, none of the participants reported using the wisdom of the crowd and crowd-sourced investment analysis to solve the problem of information asymmetry in equity crowdfunding. This finding is inconsistent with arguments about using the two instruments to tackle information asymmetry in equity crowdfunding,[1059] possibly because most participants did not know about them.

The regulation of equity crowdfunding in Indonesia does not provide a detailed mechanism to protect investors from fraudulent offerings, whereas regulations in the US and Australia have a provision similar to the Indonesian regulation regarding minimum information and documentation that should be provided to investors. However, Indonesian regulation does not encourage start-ups and platforms to provide information relevant to their different circumstances to enable investors to make decisions based on their current situation. Regulations in the US and Australia prohibit an issuer from providing information that can mislead investors, but a similar provision is not available in Indonesia. Therefore, there is a potential gap between the requirement to meet the minimum information that should be disclosed to investors and their expectation of information to make a sound investment decision. This finding suggests that the current regulation is too narrow and can reduce investor confidence in their investment decisions based on the information provided by the platform. These conditions are not expected since equity crowdfunding regulation in Indonesia has not effectively addressed the real problem of information asymmetry.[1060] Therefore, the regulation should be broadened to include a principle-based provision such as in the US and Australia that require issuers to present any relevant information or documents to investors.

One important finding in this study was that, on the one hand, many participants were concerned about fraudulent offerings through equity crowdfunding but on the other hand, based on the comparative analysis the current regulation in Indonesia does not provide sufficient protection for investors. The current administrative sanctions in the Indonesian regulation only allow the Indonesia FSA to enforce the regulation after

[1058] Ibrahim (n 602) 593.
[1059] Schwartz (n 563) 658; Ibrahim (n 602) 596.
[1060] For the discussion on effectiveness in legal transplant see para 2.9.4 of this thesis.

its violation is detected. There are no measures to effectively prevent a fraudulent offering on an equity crowdfunding platform. Moreover, the court system has not generally protected investors from fraudulent conduct.

Furthermore, deceptive conduct in equity crowdfunding is not within the criminal provisions of the Capital Market Law. Therefore, the Indonesian FSA does not have the power to conduct a criminal investigation concerning deceptive conduct in securities offerings through equity crowdfunding. The existing criminal code would also be difficult to use to enforce any fraudulent offering in ECF. There is no guidance for police to determine what is a deceptive and a genuine offering.

Therefore, the concern about potential fraud in equity crowdfunding offering is not adequately addressed by the current regulatory framework. The literature suggests that the efficacy of legal institutions determines the effectiveness of legal reforms.[1061] In addition, the rights and protection of investors is a potential determinant of investors' readiness to invest in a firm.[1062] Therefore, legal rules and law enforcement must be effective in order to adequately protect investors.[1063] The findings in this study and the comparative analysis show that conditions in Indonesia are not favourable and can decrease the level of investor confidence because there is no effective mechanism to address this issue.

The appropriate solution is to implement provisions similar to those in the US or Australia which combine a minimum requirement for a document and standard information and principle-based regulation that encourages issuers to present any relevant documents or information. The purpose is to provide investors with the information required to make a sound investment decision.

8.7 Regulation Should Address Risk of Fraud from Scamming, Use of Fund and False Documentation

The findings in this study indicated that participants were concerned about the risk associated with equity crowdfunding. Some believed that people could create start-ups and use them for scamming through equity crowdfunding. The problem is

[1061] Pistor, Raiser and Gelfer (n 382) 357.
[1062] La Porta et al, 'Law and Finance' (n 388) 1114.
[1063] Ibid.

exacerbated by the issuer and investors not meeting face-to-face. All the information is displayed in an electronic document on a platform. Therefore, participants suggested that there should be a mechanism to differentiate between genuine and fraudulent start-up offerings and that the level of supervision should be increased because investors can be exposed to a fraudulent offering.

In Australia, the equity crowdfunding platform is positioned as a gatekeeper, undertaking due diligence of the offer documents. The design of the CSEF regulation in Australia provides more power to the platform in screening the issuer. It can ask an issuer for more information or documents to ensure that the offer document is 'clear, concise, and effective'. This is an effective regulatory strategy because ASIC has no role in reviewing the offer document. The platform has more knowledge and expertise than ASIC in screening issuers. It also has a duty to check the offer document. It therefore has to establish policies and SOP to meet the requirements of reasonable checking of the offering information or documents. This is consistent with the Freiberg suggestion[1064] that regulatory rules should not be used because the platforms are better positioned to make decisions and to determine the various alternatives to achieve the outcome. The use of policies and SOP indicates that Australian regulation prefers to use soft[1065] rather than hard law to address the performance of the platform's duty, because soft law is more flexible and adaptable.

The US uses soft law, but the instrument is different. Rather than imposing duties as in the Australian regulatory approach, the US uses principle-based regulation to address the screening and due diligence conduct of the equity crowdfunding platform. It is required to check the offer document using a reasonable basis assessment and must deny access if there is 'a reasonable belief' that there is potential fraud or concern about investors' protection. Although the wording in the JOBS Act is that an intermediary shall 'take such measures to reduce the risk of fraud with respect to such transaction, …', the regulation of equity crowdfunding puts the platform as an intermediary, and the standard of its conduct is similar to a broker-dealer; so the platform has to apply the 'reasonable basis' principle in conducting its business.

[1064] Freiberg and Banks (n 193) 209.
[1065] Ibid 210.

In comparison, the US uses an antifraud provision[1066] to prohibit an issuer from using a deceptive scheme or creating a material misstatement in the process, as explained in chapter 7. The US approach uses civil action, either by the SEC or investors, as a recourse to recover investors' losses.[1067] In addition, the government can bring criminal action for violation of antifraud rules.[1068] As explained in chapter 7, any deceitful or fraudulent conduct, and misstatement in any securities transaction in Indonesia can only be criminalized if the underlying securities are traded in a stock exchange or bought or sold by issuers of an IPO or public companies.[1069] Therefore, criminal action is not applicable for any deceitful or fraudulent conduct, and misstatement in relation to an equity crowdfunding offering. It is possible to change the article in the Capital Market Law to broaden its application to include equity crowdfunding offerings; however, this is a long-term strategy.

The option is to use civil action, such as in the US, which is inefficient and difficult if applied in Indonesia. The cost and time required for civil litigation in Indonesia are too high, compared with financial compensation for the investor in equity crowdfunding. Even if the investor could win the court case it would be costly because of weak law enforcement and corruption[1070], especially in the court system.[1071] This option is not preferable since it does not promote effective legality as explained by Borkowitz et al. because the existing legal institutions may not provide cost-effective law enforcement for the investors in equity crowdfunding in Indonesia.[1072]

The other option is the Australian approach that gives power to ASIC to intervene during the offering if it considers a document is defective or the offer document is not presented in a 'clear, concise and effective' manner. ASIC may then exercise administrative or 'stop order powers'[1073]. ASIC's hands-on approach can prevent investors from being exposed to a fraudulent offer document. This approach could be transplanted to the Indonesian context for several reasons. First, the Capital Market Law

[1066] Black (n 906) 306-7.
[1067] *The Securities Act of 1933* (n 794) § 17(a); Bradford (n 845) 1181.
[1068] Bradford (n 845) 1181.
[1069] *Law No. 8 of 1995 on Capital Market Law* (Indonesia) (n 20) article 90.
[1070] See Bedner (n 323) 256. Laffont (n 242) 2-3.
[1071] Bedner (n 323) 25.
[1072] For the discussion of effective legality see Berkowitz et al (n 377) 167.
[1073] See *ASIC Information Sheet 151* (n 951) 2.

provides the Indonesian FSA with the power to 'require Persons suspected of engaging in or having been involved in a violation of this Law or its implementing regulations, to do or not to do certain things'.[1074] Second, the equity crowdfunding regulation has a provision concerning administrative sanctions that can be used if the FSA considers there is a violation of equity crowdfunding regulations. However, the types of sanction are 'written admonitions; fines; restrictions on business activity; suspensions of business activity; revocations of business licenses; cancellations of approvals; and or cancellations of registrations'.[1075] Therefore, the solution to this limitation is to add a provision that determines in what circumstances the Indonesia FSA has the power to instruct a stop order. However, it will only be effective if there is a principle-based regulation that prevents issuers from putting fraudulent offer documents on platform websites, as explained in the previous section.

[1074] *Law No. 8 of 1995 on Capital Market Law* (Indonesia) (n 20) article 100(2)b.
[1075] *Indonesian FSA Regulation on Equity Crowdfunding* (Indonesia) (n 11) article 66.

Chapter 9 : Conclusion, Recommendations and Future Work

9.1 Restatement of purpose

The development of equity crowdfunding has led many countries to regulate this area to facilitate its potential as an alternative for funding SMEs and start-ups.[1076] Although in terms of market size, equity crowdfunding has not replaced traditional sources of capital, it has grown significantly.[1077] While other sources of capital such as banks, angel investors and venture capital have been consolidated and provide less capital since the global financial crisis of 2008[1078], the availability of equity crowdfunding is anticipated by many stakeholders in developed and developing countries to fill the gap that cannot be provided by traditional sources of funding.[1079]

Many developed countries have regulated equity crowdfunding to make it accessible for retail investors. Without specific regulation to accommodate equity crowdfunding, most existing securities regulations in developed countries restrict its development because the offering is costly and ineffective due to the requirement to file a registration statement and subsequent disclosure and governance obligations for issuers. Most SMEs and start-ups are unable to meet these requirements, as commonly applicable for securities issuers. Regulation on equity crowdfunding is designed to exempt SMEs and start-ups from these requirements in order to facilitate public fundraising. However, this policy has been criticized because the requirement for a registration statement and disclosure obligation ensures that investors will have the necessary instruments to make sound investment decisions. Without this information, investors will not be protected from potential fraudulent offerings.

One of the challenges in regulating equity crowdfunding is the inherent risk involved in SME and start-ups investment due to possible venture failure, fraud, lack of a secondary market for investors who exit early from their investment, and the problem of monitoring it. The other challenge of regulating equity crowdfunding is creating

[1076] European Commission (n 5).
[1077] Tomczak and Brem (n 25) 335; Mollick (n 40) 4; Tuomi and Harrison (n 78) 610; and Vulkan, Åstebro and Sierra (n 93) 38.
[1078] Pichler and Tezza (n 48) 5; Capizzi and Carluccio (n 104) 117.
[1079] Corporations and Markets Advisory Committee (n 118) 6; Avdeitchikova (n 149) 100.

securities offerings that is cost-effective and suitable for most SMEs and start-ups. They are typically created for a certain project and seek funding that is suitable for their stage of development. Most start-ups begin in the pre-seed funding stage with capital from savings, friends, and families. In the next stage they need seed funding commonly from angel investors. This is followed by the expansion stage, typically using funding from venture capital. In general, banks are not an option for start-up funding because most do not have collateral or a financial history. However, some use short-term loans from banks or P2P lending if banks provide access to a loan.

The two traditional sources of funding, angel investors and venture capital, are categorized by regulation in some developed countries as sophisticated investors or accredited investors because of their expertise in investing in start-ups and SMEs, their capacity to cope with risk and to monitor the investment and are categorized as high net worth investors. In contrast, regulation in some developed countries considers retail investors as unsophisticated investors who do not have specific expertise in investment, cannot deal with investment risk or monitoring of their investment, and are not categorized as high net worth. These different assumptions about the two categories of investors have led regulators to treat them differently in regulations.

Before regulation of equity crowdfunding, in many developed countries it was used to facilitate start-ups to seek funding from sophisticated investors. Regulation in these countries commonly has a special exception for the operation of equity crowdfunding, because it facilitates companies to offer securities to sophisticated investors without filing a registration statement. Therefore, the equity crowdfunding market existed before any specific exemption of regulations provided access for retail investors. When regulators opened access for retail investors to equity crowdfunding, they made adjustments to protect retail investors by modifying requirements for reporting and disclosure and using a platform as an intermediary to make equity crowdfunding cost-effective.

However, creating a regulatory framework that considers both the interests of start-ups that need a cost-effective process of securities offering and establishes a proper disclosure regime to provide adequate protection for retail investors has been challenging. On the one hand, there was a view that the standard of disclosure should not be lowered because investors need adequate information to make sound investment decisions,

without which information asymmetry will not be overcome and create ‘a lemon problem’. On the other hand, the types of information used by angel investors and venture capitalists to invest in start-ups are different from securities investment in a stock exchange.

The potential of equity crowdfunding has created great interest in many developing countries. Some, including Indonesia, have started to regulate it. However, Indonesia has a different regulatory framework, and different levels of business development and legal institutions. Unlike many developed countries, any offering of securities to the public is required to file a registration statement to the Indonesian FSA. The only exception is if the offering is to less than 100 people or sells to a maximum of 50 people, and the maximum amount raised is less than Rp1 billion (A$100,000). Start-ups can also raise funds from investors through a private placement. As long as they are not a public company in which the number of shareholders is less 300 and paid-in capital is less than Rp3billion (A$300,000), start-ups can sell shares to investors, provided the offering does not use the mass media, including electronic media such as television or the internet. If the standard of a public company is met, the requirement to file registration and continuous disclosure will be applicable.

These exception rules are not suitable for developing equity crowdfunding; without using the internet, start-ups will have difficulty seeking investors, other than angel investors and venture capitalists. Moreover, the limitation on fundraising is too low to make it attractive for potential platforms and many start-ups. The main challenge in drafting the regulation of equity crowdfunding in Indonesia was that was no platforms had a license from the FSA and the market did not exist.

Therefore, the drafting was based on input from and discussion with stakeholders and comparing regulations especially in developed countries. This approach was considered a standard procedure in the rulemaking process in drafting the Indonesian FSA regulations. The Indonesian FSA implemented a regulation on equity crowdfunding at the end of 2018. It is important to now evaluate the effectiveness of regulation in facilitating start-ups to obtain funding from equity crowdfunding.

This study is, to the best of our knowledge, the first to evaluate regulation of equity crowdfunding in Indonesia. Its objective was to investigate factors that can boost the confidence of stakeholders in Indonesia to participate in equity crowdfunding. It also

intended to evaluate the barriers in existing practice, laws, and regulations in Indonesia to developing equity crowdfunding. Lastly, this study aimed to discuss legal regulation from developed nations that would enhance the adoption of equity crowdfunding regulation in Indonesia.

This study employed two research methods to answer the research questions. The first was qualitative methodology using semi-structured interviews. The purpose was to gather data on the meaning of the phenomenon under investigation from interviewees. They were asked about their views, experiences, and perceptions concerning equity crowdfunding in Indonesia. The 22 participants, mainly from Jakarta, were government officers, Indonesian FSA officers, the CEOs of start-ups, a potential equity crowdfunding platform that had approached the Indonesian FSA to apply for a license of operate, and some traditional investors of start-ups such as angel investors and venture capitalists. The study also sought participants from start-ups in Jakarta, Bandung, Yogyakarta, and Denpasar.

The second research method was comparative law method. It was used to analyse similarities and differences in regulation of equity crowdfunding between Indonesia, the US, and Australia. The purpose was to understand how different legal systems solve the same problem by using a functional approach in comparative law. Although the US and Australian legal systems use common law, Indonesia has experienced transplanting of laws from the US and other common law countries. Some scholars have categorized the Indonesian legal system as a hybrid. Historically, several different legal systems have operated in Indonesia. The country inherited laws and codes from the Dutch colonization era, as well as Islamic law in the area of marriage and inheritance law, *Adat* law in the area of land law and inheritance law that is still effective in some tribes in Indonesia, and national laws which were promulgated after the country's independence. Some of the national laws such as bankruptcy law and consumer law were transplanted from common law countries. Other national laws such as the Capital Market Law, the Insurance Law, the Corporate Limited Liability Law, and the Environmental Law have been influenced heavily by the common law system.

9.2 Conclusion of the findings

This study discussed several findings based on the key themes from the participants' interviews and the comparative law analysis of similarities and differences in regulations in the US, Australia, and Indonesia. Mostly, participants' perceptions of equity crowdfunding were positive because it provided a shorter and low-cost process for funding start-ups and opened investment opportunities for retail investors. This perception is vital since it can provide a fundamental belief for all stakeholders in Indonesia to utilized equity crowdfunding to its optimal. Without this belief, any doubt concerning the equity crowdfunding can cause negative opinion that can be detrimental to the existence of equity crowdfunding.

As equity crowdfunding is new and involves the investment of retail investors' funds through the internet, it can generate negative opinions. It carries many risks such as start-up failure, platform operation failure, fraud, lack of a secondary market for investment, and limited disclosure. Without a certain level of confidence from stakeholders, any risks could erode the confidence of all stakeholders. A high failure rate would diminish stakeholder confidence and destroy. As explained in the literature, the total number of company failures in equity crowdfunding in the UK reached 30% in 2013, but in 2014 was 5% and in 2015 was 3%.

This study identified that that venture capitalists and angel investors in Indonesia were still not developed. An earlier study of venture capital and angel investors in developing countries found that these two types of start-up investors had not developed because of weak investment institutions, lack of a regulatory framework, and the absence of a venture capital culture.

This study revealed other reasons why venture capital in Indonesia has not developed. Firstly, the available source of capital was mainly from banks. It only sought funding for short-term investment such as productive business financing, which is essentially a loan to finance a venture project. Both the principal and interest must be returned to the venture capitalists. Shares participation was not considered appropriate interesting because it is a long-term investment that not suitable for the interest of channelling the fund. Secondly, tax policies have made it difficult for venture capital to raise funds. Tax policies have meant investors have to pay triple tax from one income

source, their investment in the venture fund. Thirdly, start-up' participants had different perceptions about accessing funding from angel investors. However, some remarked that not all angel investors had could assess the value of start-ups.

Although a more quantitative study is required to analyse what influences the development of venture capital, this finding is still considered important for policymakers to address. At least this study provides directions for further study relating to equity crowdfunding.

The literature suggests that equity crowdfunding typically fills the gap in seed capital left over by angel investors and venture capitalists. Most venture capital in developed countries focuses on providing finance for the expansion stage. Some participants perceived a similar situation in Indonesia that caused venture capital to be selective in providing funding for start-ups, preferring to fund later stage start-ups. Without appropriate support from venture capital, even if a start-up succeeds in raising funds from equity crowdfunding, it will be difficult to develop further. Consequently, retail investors will have fewer opportunities for an early exit from the acquisition of their shares by venture capitalists or from the IPO since these start-ups will not have reached maturity and do the IPO. Therefore, this finding indicates that the immature development of domestic angel investors and venture capitals could affect retail investor confidence in equity crowdfunding.

This study has identified that the role of foreign angel investors and venture capital is critical to the Indonesian start-up funding environment. Foreign investors use co-investment and networking with domestic angel investors and venture capital to adapt to Indonesia's onerous investment conditions. The literature explained that it was a common strategy to share the risk of investment and burden of monitoring with an investment syndicate. Domestic investors understand more about local start-ups. Moreover, the findings revealed that some participants perceived foreign angel investors and venture capitalists had more expertise in predicting which start-ups had the potential to succeed.

The literature suggested that the role of lead investors in equity crowdfunding increased funding success and investor confidence. However, comparative law analysis demonstrated that this potential role of foreign angel investors and venture capitalists has not been facilitated by current Indonesian FSA regulation on equity crowdfunding.

The exception was the investment cap in equity crowdfunding for legal entities and those with a securities account for more than two years. These foreign investors potentially can become a magnet to attract more retail investors, or even domestic angel investors and venture capitalists to invest in equity crowdfunding. Losing this opportunity to collaborate could diminish retail investor confidence in equity crowdfunding. This finding has shown that the investment cap exception is considered a burden that potentially deters foreign angel investors and venture capitalists who wish to be lead investors or join syndicates to participate in equity crowdfunding.

The other important finding was that banks and P2P lending were not an option for most start-ups in Indonesia. The literature suggested that in other countries banks provided limited funding for start-ups, especially pre-seed funding. Lack of funding from banks slowed development of start-ups that had to rely on personal saving, friends, and family. Several participants noted that most banks do not consider computer software or applications as assets that can measure the business capacity of the start-ups which can affect equity crowdfunding. At what stage, equity crowdfunding should be placed within the stages of funding for start-ups in Indonesia. Providing access to a very small size of venture can cause the platform in a difficult situation to operate normally.

However, some participants perceived that the limitation on the funds raised in equity crowdfunding could influence the sectors and size of start-ups that use equity crowdfunding as an option for capital. The literature suggested that the actual cost of accessing equity crowdfunding should be assessed to ensure it is suitable for most start-ups and does not create a burden. This can have a significant effect on equity crowdfunding. Therefore, to increase the confidence of start-ups in equity crowdfunding, the real costs should be evaluated by the regulator to ensure that it is attractive.

This study also found that most start-ups would assess the cost of funding from equity crowdfunding and compare it with the other domestic or foreign sources. Many participants did not consider equity crowdfunding was an alternative funding source, especially because of its fund-raising cap. This finding is consistent with the literature that suggests an entrepreneur's preference for funding depends on its terms. Better terms will influence start-ups to use equity crowdfunding. However, the preference is between available sources of funding within a country and funding from other countries. The implication is that if the term of investment from other countries is better,

investors might create a holding in another country while the start-up status is only an operational company. From the perspective of the Indonesian economy, this is a lost opportunity because the start-ups in Indonesia will then send part of their dividend to their holding in foreign countries. Therefore, the cost for start-ups of accessing crowdfunding should also be considered and whether it is sufficiently competitive compared with access to funding from other countries. Otherwise, start-ups will use funding from other countries rather than equity crowdfunding in Indonesia.

9.3 Recommendations

This section makes recommendations for the Indonesian FSA, the Creative Economic Agency of Indonesia, the Ministry of Co-operative and Small and Medium Enterprise, the Ministry of Finance, and the Ministry of Communication and Informatics about how to improve stakeholder confidence in equity crowdfunding and possible solutions to remove or reduce burdens and improve the current regulatory framework that inhibits the development of equity crowdfunding.

1. The funding environment for start-ups to develop in Indonesia should be improved. Banking regulations should assess the capacity of start-ups based on income from the operation of software or applications. In other words, intellectual property in software and application development should be recognized in measuring a start-up's business capacity and as collateral for applying for loans from a bank. In addition, the tax policy should be addressed to encourage more domestic and foreign investors to invest in Indonesian venture capital. Abolition of the triple or double tax treatment for investors would increase investors' interest in the venture capital in Indonesia.
2. Since equity crowdfunding is filling a funding gap, without well-developed support from angel investors and venture capitalists, start-ups in Indonesia will have difficulty expanding to the development or maturity stage. Providing a more supportive institutional and regulatory framework for both sources of funding needs to be addressed, in parallel with developing the equity crowdfunding environment.
3. Equity crowdfunding regulation should facilitate the roles of foreign angel investors and venture capitalists as lead or syndicate investors in equity crowdfunding. Their experience and expertise can be used to attract more retail investors or other domestic angel investors or venture capitalists to invest in equity crowdfunding. Therefore, the exception of investment cap in the equity crowdfunding regulation needs to be

changed and differentiate retail and sophisticated investors. The criteria for a sophisticated investor should reflect on their expertise in start-ups and the capacity to cope with risk, monitor the investment, and their high net worth. These changes in the regulation should encourage angel investors or venture capitalists to be lead investors in an equity crowdfunding offering.

4. The maximum limitation in equity crowdfunding should be evaluated and compared with the cost of fundraising through alternative sources. The purpose is to understand whether the current implementation of equity crowdfunding regulation is not a burden in terms of the cost and the process and whether most start-ups are interested enough in the limitation of fundraising in equity crowdfunding. The regulation should determine where in the capital gap that equity crowdfunding in Indonesia should be positioned, based on the real demand for capital for start-ups.
5. The design of equity crowdfunding regulation should consider equity crowdfunding as an alternative form of funding for start-ups in order to prevent repatriation of profits from start-ups to holding companies abroad.
6. The framework of equity crowdfunding regulation should be amended to prevent fraudulent offerings. Legislative reforms should target the following areas:
    a. The regulation should facilitate early communication between issuers and potential investors before equity crowdfunding offering, so that the issuers can measure whether the demand from the investors is sufficiently attractive for the issuers.
    b. Refine the criteria of investors who are exempted from investment cap. Rather than provide exemption for legal entities and investors who have certain experience in the capital market investment, it would be better to have clearer criterion that are based on business expertise in financial services, the amount of individual networth and assets, as well as financial sophistication, knowledge and expertise.
    c. Prohibit issuers from making ‘an untrue statement of a material fact or omits to state a material fact required to be stated or necessary to make the statements’ or misleading the purchaser.

d. Implement a principle-based regulation, such as the Australian one which requires an offer document to be provided in a 'clear, concise, and effective' manner.
e. The platform should be positioned as a gatekeeper that monitors and checks the offer document and information provided by the issuer, based on a principle-based provision such as 'a reasonable basis standard' in the US or a duty to conduct checking and establish policies and SOP in the Australian regulation. The principle-based provision should then be accompanied by more detailed provisions to meet this requirement. For instance, a platform should check the accuracy of the issuer's information based on the company registration website. Moreover, as the gatekeeper, the platforms should have the power to stop issuer access to the platform, especially if, based on the platform's consideration, the offer document does not meet the regulatory requirement.
f. The Indonesian FSA should have the power to stop an issuer accessing a platform if it has concerns about the offer document. A provision similar to article 100(2)(b) of the Capital Market Law should be added to give it power to ask an issuer 'to do or not to do certain things' if it considers a fraudulent offer document could violate the regulation on equity crowdfunding.
g. The criminal law in relation to deceptive conduct in a securities offering should be broadened to include equity crowdfunding.

9.4 Research contribution

9.4.1 Academic contribution

This thesis has provided a detailed analysis of the process of regulating equity crowdfunding in Indonesia that could be useful for other developing countries interested in establishing a regulatory framework for equity crowdfunding. This thesis also contributes to the discussion of legal transplants, especially from common law countries to a civil law country such as Indonesia. Comparing regulation of equity crowdfunding in Indonesia and developed countries can provide many benefits and lessons on how it is regulated in developed countries. As the comparative analysis chapter demonstrates, the functionality perspective of this comparison can provide many useful insights about how

other countries solve a similar problem.[1080] This study extents discussion in the literature of the functionality perspective in the Indonesian context, by comparing regulation of equity crowdfunding with the US and Australia.

However, when comparing regulation between two or more other countries is important to look at the context of the underlying business of the regulation. Xanthaki argued that in addressing the social need, often the explanatory materials do not indicate the real social problem.[1081] This study supports Xanthaki's view and has demonstrated that merely comparing the regulation or law on paper, is not adequate in understanding what really happened to phenomenon under consideration.

This study has discussed how to reduce information asymmetry between start-ups and the investors. The regulation on equity crowdfunding essentially needs to establish a balance between information that should be provided by start-ups and adequate and reliable information that can be used by investors to make sound investment decisions. In this study, several entrepreneurs considered that the more information disclosed by start-ups, the more expectation of the value of fundraising that can be obtained by the start-ups to make the start-ups think that it is valuable enough to trade the information. In this study, information asymmetry theory was not a fixed concept that could be implemented for any situation. Rather, it extended discussion of the theory by showing that regulators need to determine the right balance between the supply of the information for start-ups and investors, as information is required to reduce information asymmetry in the context of a developing countries.

Regarding agency theory, this study has shown that regulation of equity crowdfunding is designed to minimize the agency problem, especially the role of an equity crowdfunding platform as an intermediary in an equity crowdfunding offering. The platform's role is central in checking and conducting due diligence on the offer document. Regulation of equity crowdfunding should therefore regulate the platform so that the issuer, the investors, and the regulators can be confident the platform will prevent fraudulent offerings and ensure that investors receive reliable information from its website.

[1080] De Cruz (n 403) 237.
[1081] Xanthaki (n 303) 662.

In relation to the stages of funding theory, this study showed that the regulatory design of equity crowdfunding needs to consider the stages of funding in relation to several issues. First, the position of equity crowdfunding within alternative funding sources for SMEs and the start-ups must be clear so that the environment for start-up funding can support the capital needs of the start-ups in the pre-seed, seed, growth, expansion and maturity stage or IPO. Without a clear focus on which area of funding should be filled by equity crowdfunding, the regulation will have difficulty determining to what extent information and documentation of start-ups can be expected to be disclosed. It is unrealistic to require start-ups to disclose information similar to an issuer in an IPO. Second, a clear position on equity crowdfunding funding could help to determine limits on funding for start-ups. This is important because most start-ups will assess the cost and available sources of funding. If equity crowdfunding regulation requires too much documentation and information and time for start-ups, it will reduce their confidence in using this alternative funding source. The stages of funding theory is also important in explaining the role of angel investors and venture capitalists in start-up funding and to what extent regulation should facilitate their role in equity crowdfunding. For example, the role of the angel investor as a lead investor in an equity crowdfunding offering can be understood from the perspective of the stages of funding theory which explains how the roles of angel investors and venture capitalists can be increase the confidence of retail investors in equity crowdfunding.

9.4.2 Practical contribution

The practical contribution of this study is recommending that stakeholders in Indonesia address several actions to increase stakeholder confidence in equity crowdfunding, such as conducting a survey on the real costs of start-ups accessing equity crowdfunding and determining if investors have adequate confidence to invest in equity crowdfunding. The other contribution is suggesting that the Indonesian FSA regulation on equity crowdfunding be refined policies are revised to ensure a better regulatory response to start-ups accessing bank finance and the development of angel investors and venture capital in Indonesia. These reforms would ensure that Indonesia's overall funding environment supports the development of start-ups from the pre-seed to the maturity stage.

9.5 Limitations of the study

One limitation of this study was that the sample size was small, with only 22 participants. When the fieldwork was conducted in Indonesia, not many people or institutions were willing to be because the Indonesian FSA had only recently introduced equity crowdfunding, and not all people in the start-ups had knowledge and experience of equity crowdfunding. From the implementation of the regulation on equity crowdfunding at the end of 2018 until early 2020, only three equity crowdfunding platforms received licenses from the FSA, and the market was still considered new. If the number of participants was increased to include current investors in equity crowdfunding, the data and the key themes of this study might be different, and these differences in the composition of participants could influence the results.

The other limitation is that this study does not analyse all aspects of similarities and differences in regulation of equity crowdfunding in the US, Australia, and Indonesia. One of the potential aspects that increase investors' confidence in equity crowdfunding is the governance of start-ups after the offering has succeeded. However, during fieldwork, the equity crowdfunding market was non-existent, and there were few studies analysing start-up governance, and thus discussion in this area is limited.

9.6 Suggestions for future research

One of the issues raised in this study was the real cost of accessing equity crowdfunding for start-ups companies. Research in Indonesia is urgently needed to ensure that the Indonesian FSA regulation on equity crowdfunding can be effectively implemented, in terms of the cost and process. Another important study is the governance of start-ups after successful fundraising through equity crowdfunding; better governance in start-ups could mean better protection for retail investors as minority shareholders and their increased confidence in investing in start-ups.

Another area of particular interest is the role of angel investors and venture capitalists in Indonesia. The findings of this study revealed that the venture capital funding environment lacked support from tax policies, while the current regulation on venture capital did not effectively support more funding for domestic venture capitals. A further study to evaluate the barriers to regulation in this area would help policymakers to improve the overall funding environment for start-ups in Indonesia. Future research

may need to have a larger sample and more comprehensive coverage of jurisdictions in the comparative law analysis.

A further study with more focus on the limitation of "one size fits all" approach in equity crowdfunding regulation is needed. The findings of this study revealed that certain industries such as IT and high-technology industries need a bigger amount of funding compared with other sectors in Indonesia. It is worthwhile to investigate the interaction between industry specific contexts and how the regulation should respond for these particular industries, which is beyond the scope of this thesis and merits further investigation in the future. In addition, since most Indonesian people are moslem, discussion of equity crowdfunding regulation from the perspective of sharia law is an interesting topic that worth for future study.

Although this thesis has mentioned that Indonesian Civil Code, contract law and consumer protection law have limitation in providing legal protection for investors, this thesis does not expand more detail to analyse why this condition can happen, mainly because of space and focus consideration. The focus of the thesis is micro-comparison, directly address the issue of regulation and how the regulation can be implemented effectively. Therefore, more study in this area is recommended. In addition, the discussion about justice, ethics, fairness and party autonomy (freedom of contract) in equity crowdfunding is beyond the scope of this thesis but also important areas for future research.

Appendix A: List of participants

No.	Name	Position	Code	Date
1	TFK	Officer, Indonesian Financial Services Authority	P01	18 December 2018
2	HRY	Officer, Fiscal Policy Agency, Indonesian Ministry of Finance	P02	8 January 2019
3	AS	Officer, Indonesian Financial Services Authority	P03	9 January 2019
4	IT	CEO and Co-founder P2P Lending Platform	P04	14 January 2019
5	Da & Di	Officers, Indonesian Financial Services Authority	P05	15 January 2019
6	BS	Officer, Secretariat General, Indonesian Ministry of Finance	P06	15 January 2019
7	FH	Officer, Creative Economy Agency of Indonesia	P07	18 January 2019
8	JHM	Officer, Centre of Analysis and Policy Harmonization, Indonesian Ministry of Finance	P08	21 January 2019
9	ED	CEO, venture capital	P09	22 January 2019
10	GP	Head of Venture Fund, venture capital	P10	22 January 2019
11	EI	CEO, venture capital	P11	25 January 2019
12	SW	angel investor	P12	25 January 2019
13	Heinrich Vincent	CEO, potential equity crowdfunding platform	P13	28 January 2019
14	EE	Founder, start-up company	P14	2 February 2019
15	ESN	CEO, start-up founder	P15	6 February 2019
16	RZ	CEO and start-up Co-founder	P16	8 February 2019
17	SRY	CEO and start-up Co-founder	P17	11 February 2019
18	KP	Founder, Jersey Bali Digital Agency (Founder start-up company)	P18	14 February 2019
19	ADY	CEO, start-up company	P19	14 February 2019
20	TVN	CEO, start-up company	P20	22 February 2019

21	TM	COO, co-founder, start-up company	P21	23 February 2019
22	FHW& KD	potential equity crowdfunding platform	P22	1 March 2019

Appendix B: Selected Interview Guides (Author's translations of the original in Bahasa Indonesia)

A. Interview guide for Asadulloh Sefnado, Officer, Financial Services Authority of Indonesia, 9 January 2019

1- What are your current duties and functions, and how long have you been in this position?
2- Could you explain what the activities of venture capital are, especially the Syariah one?
3- Based on your knowledge, in Indonesia, how the Syariah venture capitals get their business partner, are they active in the sense of searching or they tend to be passive, Sir. So, do the start-ups ask for funding from the venture capitals?
4- Actually, where does the capital of the venture capitals in Indonesia come from?
5- May the venture capitals obtain the capital from foreign sources? So, for example there is a foreign investor who wants to invest in an Indonesian venture capital, is this allowed?
6- Are you familiar with crowdfunding?
7- Have you received any information concerning crowdfunding?
8- Have you ever contributed in social crowdfunding?
9- Do you think crowdfunding is a good instrument?
10- What is the difference with other conventional sources of funding?
11- If we talk about the comparison between equity crowdfunding with conventional and Syariah banking, venture capitals and angel investors, what do you think about the weakness and the strength of each funding sources?
12- If there is information asymmetry between the start-up who wants to offer its shares and the investors, how to minimize this?
13- To discipline the agents from the rules, the association regulate its member, a kind of self-regulatory organization, an organization which has the power to regulate itself and its member?
14- Is it faster in term to obtain the funding; the companies can offer their shares and get the monies more quickly?
15- Without the rating, will the investors having difficulties to determine whether the companies who offer their shares are good or not, will it be difficult?

16- But does it need to be regulated, I mean does the FSA regulation should include the scoring system, or just leave it?
17- For now, it hasn't ready, the scoring system, for example if I want to know a certain SMEs or cooperatives' rating, where should I get the access?
18- Now, if you look at equity crowdfunding, will it become a competitor for other sources of funding such as conventional banking, Syariah, venture capitals and angel investors, or become the complement?
19- Other than as a competitor, do you agree that equity crowdfunding will also provide the supply of fund which is not provided by the other sources of funding?
20- Is it necessary to have a certain limitation, only a certain SMEs and start-up can have access to equity crowdfunding to protect the society?
21- In your opinion, this kind of system which able to make the platform do the selection, does it need to be regulated of let the market rule, or as you mentioned earlier, the conduct of the platform should be standardized by an association or a kind of it, which one should we choose?
22- From the type, if there should be limitations, what do you think the right criteria to be used, young and growth companies?
23- The next question is whether there should be a restriction when is actually a SMEs or start-up ready to offer equity crowdfunding, for example if under than 1-year age should this be allowed?
24- How about the strategy, should it be allowed to do the equity crowdfunding but at the same time one also uses P2P, can they combine it?

B. Interview guide for Ivan Tambunan, CEO and Co-founder, PT Akseleran Keuangan Inklusif Indonesia (P2P Lending Platform), 14 January 2019

1- Firstly, I would like to ask, could you explain what your current company is and in what area and what is your role in this company?
2- For the start-ups, which one is better, the platform who is looking for the start-up or the start-up who is searching for the platform, or the platform gets the recommendation from…
3- But if there are investors who have interested in start-ups, there is still an information of symmetry problem. While the start-ups may know its own

prospects, how the investors have the instruments to … how to bridge this problem?

4- The platform does the due diligence yeah. What should be the minimum information in there?
5- Now if we look at the existing regulation, it is mentioned the business plan, but the business plan is still too generic. If the investors look at it or the platform try to understand the business plan, will it have the same understanding with what the elements of the business plan as you have mentioned?
6- For the investors, they will look at the information which is given by the start-ups or SMEs. So, how far should the platform be responsible to the correctness of the information?
7- Meaning that in the context of equity crowdfunding, should the standard be different? For example, the platform itself, how should it create the balance of information which are provided by the start-up or to what extend should the platform conducts due diligence?
8- If what have you said that the text of individually or jointly responsible is not appropriate, how to make it balance and what are the standards?
9- Is the regulation should also regulate how the due diligence should be done?
10- With the standards of legal liability as stated in the section 1365 Indonesian Civil Code, while the wording in the FSA regulation is simple, should there be a code of conduct or standard mechanism needed for the platform to do the review?
11- What is your opinion in relation to the platform which conduct this rating?
12- Does this up to the platform so that the users or the investors have a simple guidance?
13- Concerning the valuation, how to ascertain that the valuation is fair, so that the investors know what they will buy, is the valuation really fair or how should be the mechanism?
14- Then, for example, if the platform does the valuation, is it necessary for the platform to be required to have valuation skills or they can cooperate with a third party?
15- How about investor education concerning investment risks?
16- Does it need a specific certification to certify that someone has taken the education program?

17- If we look at the start-up and SMEs in general, which part of funding will the equity crowdfunding be positioned?
18- How about in Indonesia, will this be a like a ladder or there is not step by step of financing for start-up funding?
19- From your perspective, is equity crowdfunding is a good instrument to raise fund?
20- Does equity crowdfunding can support all sectors or certain sectors?
21- This is related to dilution, in equity crowdfunding there is possibility of dilution when a company issues more shares as regulated in the Limited Liability Company Law. What is your view, is this rule discourage start-up for the next share issuance? Will this discourage the start-ups to use equity crowdfunding?
22- How about the strategy, what is your view whether equity crowdfunding should be separated from P2P or it can be combined?
23- Does it have to be disclosed if combined with the other sources of funding such as venture capital, angel investor, banking?

C. Interview guide for Eddi Danusaputro, CEO, PT Mandiri Capital Indonesia (venture capital), 22 January 2019

1- Can you explain what your current position is and what is actually the business area of Mandiri Capital?
2- What is your view concerning the availability of funding from the venture capitals in Indonesia? Is it quite available to the need of funding for the development of start-up companies and SMEs?
3- How about the funding from Mandiri Capital? Does Mandiri Capital usually active in searching the business partner, top-down or do the start-ups come to Mandiri Capital?
4- And then for the other start-up funding, is there any cooperation with the other institutions including with the government?
5- The next question is about crowdfunding. Are you familiar with the term?
6- Have you ever participated in it?
7- If we look at the potential of equity crowdfunding, do you agree that equity crowdfunding has potential for growth and jobs?

8- How about the strategy, in your opinion, should the funding from equity crowdfunding be separated from the other sources of funding such as venture capitals, angel investors or it can be mixed as a funding strategy for start-ups?
9- As a funding source for the start-up, is it better for the start-up to do the equity crowdfunding first and then go to the angel investors?
10- Commonly, how much is the amount of the seed stage for an Indonesia start-up, and then how much investment from the angel investors, and then from the venture capital? Is there any standard about it?
11- If compared with other sources of funding such as conventional banks, venture capitals, what is your views about this?
12- From the sectors, is there any specific sectors which are suitable for equity crowdfunding, or this is suitable to all sectors?
13- Is there any necessary limitation for the SMEs or start-ups that can access the equity crowdfunding?
14- What should be the minimum age?
15- For each offering by the start-up, the start-up can offer Rp10 billion maximum, what is your opinion concerning this limitation?
16- You have mentioned that there should be an equal protection between the investors and the start-up, but there is information asymmetry, where the start-up has already known about certain information, while the investors have not known it, such as how to do the valuation of the start-up. Is this enough for the investors to do the valuation based on reading the financial report and the business plan of the start-up?
17- In the period of post issuer campaign in equity crowdfunding, according to the current limited liability company law, any new share issuance must be approved by the general shareholders meeting (GSM), do you see it as a burden or not?
18- Yes, and then concerning the information which should be informed to the public, to make it fair, how is the responsibility of the platform and the start-up as a company which offer shares, in term of the accuracy of the information? To what extend the platform should be responsible? Should the platform only responsible for any documents which received by the platform, and the platform only reviews the formal accuracy, or should the platform check the start-up's location and et cetera?
19- Do you see equity crowdfunding as a high-risk investment?

20- Is it suitable for the current financial literacy of Indonesian investors nowadays?
21- How about the limitation for investment, investors may only invest inequity crowdfunding for a maximum 5% of their revenue?
22- How to minimize the risk of fail from the start-up after the campaign period, Sir. Does the platform should have the power to do the selection which start-up will have the potential to fail or should the market decide this matter?
23- From the business practice, do angel investors in Indonesia have already developed, Sir?

D. Interview guide for TVN, CEO, start-up company, 22 February 2019

1- Can you explain what the business of your company is and how long have you been in this position?
2- Can you explain the first time you established [name of a company] company? Where did you find the first funding, and after that was there any other funding and from where?
3- At that time, what was the form of the [name of a company] product, at what level?
4- What kind of information that you gave to the angel investor, to make her interested, what kind of information was needed by the angel investor?
5- How about the company documentation and other thing? Did the angel investor conduct the due diligence?
6- Did the angel investor challenge the valuation which you had set; did they offer it?
7- When the investor entered, did the angel investor act passively or actively, and were there a kind of intervention in your company?
8- How about the information concerning the development of you company? Did you send it, or the angel investor asked the information?
9- Was the report concerning the use of the investors' money also required?
10- In your opinion, do you think it is easy for Indonesian start-ups to access the angel investors?
11- In your opinion, other than the angel investors, what can be accessed by the Indonesian start-ups?
12- How about bank lending?

13- Now, with P2P lending, what is your view, is it suitable as a source of funding for the start-ups?
14- Do the angel investors and venture capitals actively seek the start-up, or the start-ups come to them?
15- Are there a lot of angel investors Indonesia who provide funding in Indonesia?
16- To determine the angel for seed, and you mentioned the venture capital series, can you explain to what numbers are those funding?
17- For foreign venture capitals, they bring foreign capital. What is your opinion the comparison between domestic angel investors with the foreigners?
18- Do you see the cause of it, why do the foreigners interested to enter?
19- Have you ever been a contributor or involve in a crowdfunding in general?
20- While the angel investors know the start-ups, compared with the investors who only know the start-ups from the information provided by the platform, in your opinion, what kind of information should be provided by the platform to the investors so that the investors can take a good decision to invest in what they want to buy?
21- To make it fair for the public, what is the mechanism that should be built? Does the platform should negotiate with the start-up or is there any other way? What is your opinion?
22- The shareholders from equity crowdfunding will be many, if many people buy the shares. For a digital start-up which suddenly has a lot of shareholders, would it become a problem?
23- If, for example the investors have bought the shares and they become the shareholders, what kind of information should be delivered by the start-up, so that the investors is kept well inform?

E. Interview guide for F. Hakso Widianto & Kenneth Destian, Founders and Directors, PT Likuid Dana Bersama (potential equity crowdfunding Platform), 1 March 2019

1- I would like to know what your business is and how long have you in this business?
2- In term of technology, do you create yourself or do you cooperate with another party?
3- What will your business model look like?

4- You mentioned that there are many types of potential issuers, fintech, SMEs, and creative industry. You also mentioned that for the beginning, this is only for the proven one. What is the real purpose, and what kind of start-ups do you think can access equity crowdfunding platform which you have established?
5- Based on your view, what is the available funding sources for start-ups in Indonesia, other than equity crowdfunding?
6- Which stage of funding do you think the equity crowdfunding will take a role, at the seed or above the seed?
7- While the possibility of fail is high, there is an issue of discontinuity in the equity crowdfunding business. What is your opinion about this, do you think the equity crowdfunding platforms should have a code of ethics of how to increase the survival rate so that the start-ups who use the platforms are the profitable one?
8- From your perspective, what kind of ecosystem to select the better start-ups?
9- What is the role of the platform? Who conduct the due diligence? Does the platform just follow the angel investor, or there will be division of roles?
10- To ensure that the valuation is fair, does the issuer has the right to valuate himself?
11- Will there be a negotiation price, or the price will be determined only by the platform?
12- My question is if the equity crowdfunding platform fill the gap for the seed financing, concerning the character of venture capital in Indonesia, would they do the due diligence for an issuance of less than Rp10 billion per year? Does the standard of the venture capital is bigger than that?
13- After the equity crowdfunding, the shareholders become many, and the shareholders have rights. How to execute the right of the shareholders effectively?
14- Is the age limitation necessary?

Appendix C: Consent Form for Participants Involved in Research

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MELBOURNE AUSTRALIA

FORMULIR PERSETUJUAN PESERTA YANG TERLIBAT DALAM PENELITIAN
[CONSENT FORM FOR PARTICIPANTS INVOLVED IN RESEARCH]

INFORMASI UNTUK PESERTA:
[INFORMATION TO PARTICIPANTS:]

Kami ingin mengundang Anda untuk menjadi bagian dari penelitian tentang pengembangan kerangka peraturan untuk Layanan Urun Dana Melalui Penawaran Saham Berbasis Teknologi Informasi (Equity Crowdfunding) di Indonesia, untuk mengidentifikasi dan menganalisis faktor-faktor kunci dari undang-undang dan peraturan dan mengevaluasi hambatan dalam undang-undang dan peraturan yang ada di Indonesia untuk pengembangan Layanan Urun Dana Melalui Penawaran Saham Berbasis Teknologi Informasi (Equity Crowdfunding); dan untuk mengusulkan kerangka peraturan untuk meningkatkan kebijakan regulasi Layanan Urun Dana Melalui Penawaran Saham Berbasis Teknologi Informasi (Equity Crowdfunding) di Indonesia.

[We would like to invite you to be a part of a study on developing a regulatory framework for Equity Crowdfunding in Indonesia, to identify and analyse key factors of laws and regulations and evaluate barriers in existing laws and regulations in Indonesia for the development of equity crowdfunding; and to propose a regulatory framework to enhance regulatory policy of equity crowdfunding in Indonesia.]

Proyek ini akan menggunakan metode perbandingan hukum dan metode empiris kualitatif. Wawancara tatap muka digunakan. Wawancara akan memakan waktu sekitar satu jam, dan akan direkam dengan persetujuan dari para peserta. Peserta dapat memilih untuk menggunakan nama asli mereka atau tidak.

[This project will use comparative law methods and a qualitative empirical method. Face to face interview is employed. The interviews will take about one hour, and will be recorded with the consent of the participants. Participants may choose to use their real name or not.]

Jika peserta tidak ingin menggunakan nama asli mereka, karena itu menyangkut kerahasiaan peserta, nama-nama peserta, lokasi mereka, dan pihak terkait lainnya, anonimitas atau nama samaran akan digunakan.

[If the participants do not want to use their real name, therefore regarding the confidentiality of the participants, names of participants, their location, and other related parties, anonymity or pseudonyms will be used.]

SERTIFIKASI OLEH PESERTA
[CERTIFICATION BY PARTICIPANT]

Saya *[I]*, _____

dari *[of]* _____

menyatakan bahwa saya berusia minimal 18 tahun dan bahwa saya secara sukarela memberikan persetujuan saya untuk berpartisipasi dalam penelitian ini: Mengatur Layanan Urun Dana Melalui Penawaran Saham Berbasis Teknologi Informasi (Equity Crowdfunding) di Indonesia yang sedang dilakukan di Universitas Victoria oleh Dr. Yongqiang Li.

[certify that I am at least 18 years old and that I am voluntarily giving my consent to participate in the study: Regulating Equity Crowdfunding in Indonesia being conducted at Victoria University by Dr. Yongqiang Li.]

Saya menyatakan bahwa tujuan dari penelitian ini, bersama dengan risiko dan perlindungan terkait dengan prosedur yang tercantum dibawah ini yang akan dilakukan dalam penelitian, telah sepenuhnya dijelaskan kepada saya oleh Ceceh

Jaka[redacted]
Mr. Soesilo: [redacted]

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1 of 3

Harianto dan bahwa saya secara bebas tanpa paksaan menyetujui partisipasi yang melibatkan prosedur-prosedur yang disebutkan di bawah:

[I certify that the objectives of the study, together with any risks and safeguards associated with the procedures listed hereunder to be carried out in the research, have been fully explained to me by Ceceh Harianto and that I freely consent to participation involving the below-mentioned procedures:]

- Otonomi peserta harus dilindungi melalui persetujuan yang dikonfirmasi.
  [Participants' autonomy should be protected through informed consent.]
- Peneliti akan memperkenalkan dirinya sehingga identitas peneliti sepenuhnya diungkapkan kepada peserta.
  [The researcher will introduce himself so that the identity of the researcher is fully disclosed to participants.]
- Peneliti akan menyajikan informasi yang cukup kepada peserta tentang proyek penelitian sebagai prasyarat (yaitu tujuan, prosedur penelitian, dan potensi risiko dan manfaat bagi peserta) sehingga mereka dapat memutuskan apakah mereka ingin atau tidak ingin berpartisipasi dalam penelitian.
  [The researcher will present sufficient information to the participants about the research project as a prerequisite (i.e. objectives, procedures of the study, and potential risks and benefits for the participants) so that they may decide whether they want or do not want to participate in the research.]
- Peneliti akan mengkonfirmasi minat peserta untuk diwawancarai.
  [The researcher will confirm the participants' interest to be interviewed.]
- Peneliti akan menjelaskan bahwa pembicaraan direkam selama wawancara.
  [The researcher will explain that the conversation is recorded during the interview.]
- Peneliti akan meminta mengenai penutupan identitas peserta (jika mereka lebih memilih untuk menjadi anonim / nama samaran atau dengan nama).
  [The researcher will ask regarding the closure of participants' identity (if they prefer to be anonymous/pseudonyms or by name).]
- Peneliti akan meminta peserta untuk menandatangani formulir persetujuan.
  [The researcher will ask the participants to sign the consent form.]

Saya menyatakan bahwa saya telah memiliki kesempatan untuk menjawab pertanyaan dan bahwa saya mengerti bahwa saya dapat menarik diri dari penelitian ini setiap saat dan bahwa penarikan ini tidak akan membahayakan saya dengan cara apapun.
[I certify that I have had the opportunity to have any questions answered and that I understand that I can withdraw from this study at any time and that this withdrawal will not jeopardise me in any way.]

Saya telah diberitahu bahwa informasi yang saya berikan akan dirahasiakan.
[I have been informed that the information I provide will be kept confidential.]

Tertanda: *[Signed:]*

Tanggal: *[Date:]*

Pertanyaan tentang partisipasi anda dalam proyek ini dapat diarahkan ke peneliti Dr Yongqiang Li di Ceceh Harianto at +61 410 357 955 or yongqiang.li@vu.edu.au or ceceh.harianto@live.vu.edu.au

[Any queries about your participation in this project may be directed to the researcher Dr. Yongqiang Li and Ceceh Harianto at +61 410 357 955 or yongqiang.li@vu.edu.au or ceceh.harianto@live.vu.edu.au

Mr. Soesil [redacted]

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Authorised & Sworn Translator

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atau penyelidik eksternal proyek ini:

[or the external investigator of this project:]

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+62 8123218664
msubhan@telkom.co.id

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Jika Anda memiliki pertanyaan atau keluhan tentang cara anda diperlakukan, anda dapat menghubungi Sekretaris Etika, Komite Etika Penelitian Manusia Universitas Victoria, Kantor Penelitian, Universitas Victoria, PO Box 14.428, Melbourne, VIC, 8001, email Researchethics @ vu .edu.au atau telepon (03) 9919 4781 atau 4461.

[If you have any queries or complaints about the way you have been treated, you may contact the Ethics Secretary, Victoria University Human Research Ethics Committee, Office for Research, Victoria University, PO Box 14428, Melbourne, VIC, 8001, email Researchethics@vu.edu.au or phone (03) 9919 4781 or 4461.]

[redacted]

Mr. Soesilo

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Appendix D: Information to Participants Involved in Research

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MELBOURNE AUSTRALIA

INFORMASI UNTUK PESERTA YANG TERLIBAT DALAM PENELITIAN
[INFORMATION TO PARTICIPANTS INVOLVED IN RESEARCH]

Anda diundang untuk berpartisipasi
[You are invited to participate]

Anda diundang untuk berpartisipasi dalam sebuah proyek penelitian berjudul Mengatur Layanan Urun Dana Melalui Penawaran Saham Berbasis Teknologi Informasi (Equity Crowdfunding) di Indonesia.

[You are invited to participate in a research project entitled Regulating Equity Crowdfunding in Indonesia.]

Proyek ini sedang dilakukan oleh seorang mahasiswa peneliti Ceceh Harianto sebagai bagian dari studi PhD di Universitas Victoria di bawah pengawasan Dr. Yongqiang Li dari Fakultas Hukum dan Keadilan.

[This project is being conducted by a student researcher Ceceh Harianto as part of a PhD study at Victoria University under the supervision of Dr. Yongqiang Li from the College of Law and Justice.]

Penjelasan proyek
[Project explanation]

Tujuan dari proyek ini adalah untuk mengidentifikasi dan menganalisis faktor-faktor kunci dari undang-undang dan peraturan dan mengevaluasi hambatan dalam undang-undang dan peraturan yang ada di Indonesia untuk pengembangan Layanan Urun Dana Melalui Penawaran Saham Berbasis Teknologi Informasi (Equity Crowdfunding) dan untuk mengusulkan kerangka peraturan untuk memandu peningkatan kebijakan di Indonesia.

[The aims of the project are to identify and analyse key factors of laws and regulations and evaluate barriers in existing laws and regulations in Indonesia for the development of equity crowdfunding and to propose a regulatory framework to guide policy enhancement in Indonesia.]

Saya akan diminta untuk melakukan apa?
[What will I be asked to do?]

Anda diundang untuk berpartisipasi dalam sebuah wawancara yang memakan waktu sekitar satu jam. Mahasiswa Peneliti akan melakukan wawancara. Wawancara akan memakan waktu sekitar satu jam, dan akan direkam dengan persetujuan dari para peserta. Wawancaranya adalah tentang pandangan anda mengenai perkembangan Layanan Urun Dana Melalui Penawaran Saham Berbasis Teknologi Informasi (Equity Crowdfunding) di Indonesia, manfaat, risikonya, serta pengetahuan potensi dan pengalaman anda dalam kaitannya dengan bisnis, kesiapan teknologi informasi, budaya hukum dan aspek regulasi Layanan Urun Dana pada umumnya dan Layanan Urun Dana Melalui Penawaran Saham Berbasis Teknologi Informasi (Equity Crowdfunding) khusus.

[You are invited to participate in an interview which takes about one hour. The student researcher will conduct the interview. The interviews will take around one hour, and will be recorded with the consent of the participants. The interview is about your views concerning the development of equity crowdfunding in Indonesia, its potentials, benefits, risks, as well as your knowledge and experiences in relation to the business, information technology readiness, legal culture and regulatory aspects of crowdfunding in general and equity crowdfunding specifically.]

Apa yang akan saya peroleh dari berpartisipasi?
[What will I gain from participating?]

Komentar dan informasi anda, berdasarkan pengetahuan dan pengalaman anda, dapat berkontribusi untuk mendapatkan pemahaman yang lebih baik dan penemuan cara y[redacted]aturan dalam Urun Dana Melalui Penawaran Saham Berbasis Teknologi Informasi ([redacted]melayani aspek praktis dan bisnis Layanan Urun Dana Melalui Penawaran Saham [redacted]y Crowdfunding) di Indonesia. Hasil

Jakarta, October 8th 2018
Mr. Soesilo, Sworn & Certified Translator,

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dari proyek ini adalah rekomendasi kerangka peraturan bagi pembuat kebijakan dan pemerintah Indonesia untuk membuat lingkungan peraturan yang baik untuk pengembangan Layanan Urun Dana Melalui Penawaran Saham Berbasis Teknologi Informasi (Equity Crowdfunding). Peserta akan mendapatkan keuntungan dari kebijakan regulasi yang lebih baik dengan memiliki regulasi yang kuat yang dikembangkan tidak hanya dari evaluasi dan analisis rezim peraturan saat ini tetapi juga dari perspektif peserta sebagai pemangku kepentingan dari Layanan Urun Dana Melalui Penawaran Saham Berbasis Teknologi Informasi (Equity Crowdfunding) di Indonesia.

[Your comments and information, based on your knowledge and experiences, may contribute to gaining a better understanding and discovery of possible ways in which the regulatory area in equity crowdfunding may better serve the practical and business aspects of equity crowdfunding in Indonesia. The outcome of this project is a recommendation of a regulatory framework for the policymakers and the Indonesian Government to make a good regulatory environment for the development of equity crowdfunding. Participants will benefit from a better regulatory policy by having a strong regulation which developed not only from the evaluation and analysis of the current regulatory regime but also from the perspective of participants as the stakeholders of equity crowdfunding in Indonesia.]

Bagaimana informasi yang saya berikan akan digunakan?
[How will the information I give be used?]

Informasi yang anda berikan akan dimasukkan dalam sebuah tesis yang akan tersedia di perpustakaan Universitas Victoria. Beberapa bagian dari informasi mungkin dipublikasikan dalam jurnal akademik. Tanggapan anda untuk pertanyaan akan tetap rahasia. Mengenai kerahasiaan peserta, nama-nama peserta, lokasi mereka, dan pihak terkait lainnya, anonimitas atau nama samaran akan digunakan. Anda tidak akan diberi nama sebagaimana telah berpartisipasi dalam proyek penelitian. Pernyataan atau komentar anda mungkin dipublikasikan ulang di tesis atau artikel jurnal, tapi akan diatur sedemikian rupa sehingga anda, atau organisasi anda, tidak bisa diidentifikasi.

[The information you provide will be included in a thesis which will be available in the library of Victoria University. Some parts of the information may be published in academic journals. Your responses to questions will remain confidential. Regarding the confidentiality of the participants, names of participants, their location, and other related parties, anonymity or pseudonyms will be used. You will not be named as having participated in the research project. Your statements or comments may be republished in the thesis or journal articles, but not in such a way that you, or your organization, could be identified.]

Apa potensi risiko dari berpartisipasi dalam proyek ini?
[What are the potential risks of participating in this project?]

Proyek ini dikategorikan sebagai berisiko rendah. Tidak ada resiko untuk peserta, selain ketidaknyamanan umum dari sebuah wawancara. Sepanjang wawancara, jika anda merasa tidak nyaman atau memerlukan penjelasan, jangan ragu untuk mengemukakan masalah ini ke peneliti. Anda tidak perlu mengungkapkan informasi apapun yang mungkin anda tidak nyaman untuk mengungkapkan. Sebagaimana ditunjukkan, anda bebas untuk tidak menjawab pertanyaan. Anda dapat memilih untuk menggunakan nama asli anda atau tidak. Jika anda tidak ingin menggunakan nama asli anda, mengenai kerahasiaan peserta, nama anda, lokasi anda, dan pihak terkait lainnya, anonimitas atau nama samaran akan digunakan. Oleh karena itu, anda tidak akan diidentifikasi sebagai pembuat atau penulis pernyataan apapun. Juga, pernyataan atau komentar anda tidak akan digunakan dengan cara yang akan memungkinkan anda untuk diidentifikasi.

[This project is categorized as low-risk. There is no risk to the participants, other than common discomfort from an interview. Throughout the interview, if you feel uncomfortable or require explanations, please do not hesitate to raise the issue with the researcher. You do not need to disclose any information which you may be uncomfortable about disclosing. As indicated, you are free not to answer any question. You may choose to use your real name or not. If you do not want to use your real name, regarding the confidentiality of the participant, your names, your location, and other related parties, anonymity or pseudonyms will be used. Therefore, you will not be identified as the maker or author of any statement. Also, the statement or comment will not be used in a way which will enable you to be identified. You may withdraw at any time and for any reason without prejudice.]

[redacted]

Jakarta, October 3, 2018
Mr. Soesilo: Sworn & Certified Translator,
No. 527/35

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Bagaimana proyek ini dilakukan?
[How will this project be conducted?]

Sebuah metode kualitatif dengan wawancara semi-struktur akan dilakukan. Wawancara digunakan untuk memahami apa yang peserta berpikir dan pengalaman tentang wilayah penelitian ini. Setiap wawancara akan direkam di perekam suara digital. Transkrip wawancara akan ditulis oleh peneliti. peneliti akan mengumpulkan informasi dari para peserta mengenai lingkungan Layanan Urun Dana Melalui Penawaran Saham Berbasis Teknologi Informasi (Equity Crowdfunding) saat ini dari beberapa aspek seperti kesiapan bisnis, teknologi informasi, budaya hukum, serta hambatan dalam hukum dan peraturan di Indonesia untuk mengembangkan kerangka peraturan baik dari Layanan Urun Dana Melalui Penawaran Saham Berbasis Teknologi Informasi (Equity Crowdfunding). Proyek ini juga akan menggunakan metode perbandingan hukum. Metode perbandingan hukum adalah metode membandingkan sistem hukum, persamaan dan perbedaan mereka. kerangka peraturan Indonesia akan dibandingkan dengan peraturan beberapa negara maju dan berkembang. Tujuan dari perbandingan hukum, antara lain, adalah untuk memiliki pengetahuan yang lebih baik dari hukum asing, memberikan bantuan dan saran untuk legislator atau regulator dalam negeri. Analisis isi digunakan untuk menganalisis teks-teks hukum dan non-hukum dan dokumen untuk mendapatkan pemahaman tentang makna dari isi secara sistematis dan dapat ditiru, yang meliputi proses membaca undang-undang, penilaian dan dokumen kebijakan.

[A qualitative method with a semi-structure interview will be conducted. The interview is employed to understand what participants think and experience about the area of this research. Each interview will be recorded in a digital voice recorder. Transcript of the interviews will be written by the researcher. The researcher will collect information from the participants regarding the current equity crowdfunding environment from several aspects such as the business, information technology readiness, legal culture, as well as the barriers in law and regulation in Indonesia to develop a good regulatory framework of equity crowdfunding. This project will also use comparative law methods. Comparative law method is a method of comparing legal systems, their similarities and differences. Indonesian regulatory framework will be compared with the regulation of several developed and developing countries. The purposes of comparative law, among other things, are to have better knowledge of foreign laws, provide aids and suggestions for the domestic legislators or regulators. Content analysis is used to analyse legal and non-legal texts and documents to obtain an understanding of the meaning of the content in a systematic and replicable manner, which include the process of reading legislation, judgments and policy documents.]

Siapa yang sedang melakukan penelitian?
[Who is conducting the study?]

Dr Yongqiang Li (Kepala Penyelidik) dan Ceceh Harianto
Fakultas Hukum dan Keadilan, Universitas Victoria
RO3.02, 295 Queen Street.
Melbourne, Australia

[Dr. Yongqiang Li (the Chief Investigator) and Ceceh Harianto
College of Law and Justice, Victoria University
RO3.02, 295 Queen Street.
Melbourne, Australia]

Pertanyaan tentang partisipasi anda dalam proyek ini dapat diarahkan ke Kepala Penyelidik yang tercantum di atas atau penyelidik eksternal proyek ini.

[Any queries about your participation in this project may be directed to the Chief Investigator listed above, or the external investigator of this project:]

Muhammad Subhan Iswahyudi
Telkom Corporate University, Jalan Gegerkalong Hilir No. 47, Bandung
+62 8123218664
msubhan@telkom.co.id

[redacted]

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[Muhammad Subhan Iswahyudi
Telkom Corporate University, Jalan Gegerkalong Hilir No. 47, Bandung
+62 8123218664
msubhan@telkom.co.id]

Jika Anda memiliki pertanyaan atau keluhan tentang cara anda diperlakukan, anda dapat menghubungi Sekretaris Etika, Komite Etika Penelitian Manusia Universitas Victoria, Kantor Penelitian, Universitas Victoria, PO Box 14.428, Melbourne, VIC, 8001, email Researchethics @ vu .edu.au atau telepon (03) 9919 4781 atau 4461.

[If you have any queries or complaints about the way you have been treated, you may contact the Ethics Secretary, Victoria University Human Research Ethics Committee, Office for Research, Victoria University, PO Box 14428, Melbourne, VIC, 8001, email researchethics@vu.edu.au or phone (03) 9919 4781 or 4461.]

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Appendix E: Invitation to participate (email/translation in Bahasa Indonesia)

VICTORIA UNIVERSITY
MELBOURNE AUSTRALIA

Surat undangan untuk berpartisipasi

Yang terhormat Bapak/Ibu,

Anda diundang untuk berpartisipasi dalam sebuah proyek penelitian berjudul Mengatur Layanan Urun Dana Melalui Penawaran Saham Berbasis Teknologi Informasi (*Equity Crowdfunding*) di Indonesia. Proyek ini akan menggunakan metode empiris kualitatif dan metode perbandingan hukum. Mahasiswa Peneliti akan melakukan wawancara. Wawancara akan memakan waktu sekitar satu jam, dan akan direkam dengan persetujuan dari para peserta.

Wawancara tersebut adalah tentang pandangan Anda mengenai perkembangan layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*) di Indonesia, potensi, manfaat, risikonya, serta pengetahuan dan pengalaman anda dalam kaitannya dengan bisnis, kesiapan teknologi informasi, budaya hukum dan / atau aspek regulasi layanan urun dana pada umumnya dan layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*) khususnya. Wawancara akan dilakukan atas dasar kerahasiaan. Identitas dan informasi anda tidak akan diungkapkan dan akan dijaga kerahasiaannya.

Komentar dan informasi anda dapat berkontribusi untuk mendapatkan pemahaman yang lebih baik dan penemuan cara-cara yang lebih baik terkait pengaturan layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*) sehingga dapat lebih melayani aspek praktis, bisnis atau regulasi layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*) di Indonesia. Hasil dari proyek ini adalah rekomendasi dari kerangka peraturan bagi pembuat kebijakan dan pemerintah Indonesia untuk membuat pengaturan yang baik untuk pengembangan layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*). Peserta akan mendapatkan keuntungan dari kebijakan regulasi yang lebih baik dengan memiliki regulasi yang kuat yang dikembangkan tidak hanya dari evaluasi dan analisis rezim peraturan saat ini tetapi juga dari perspektif peserta sebagai pemangku kepentingan dari layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*) di Indonesia.

Proyek ini sedang dilakukan oleh seorang mahasiswa peneliti Ceceh Harianto sebagai bagian dari studi PhD di bawah pengawasan Dr. Yongqiang Li dari Fakultas Hukum dan Keadilan (College of Law and Justice), Victoria University, , Melbourne.

Terima kasih atas partisipasinya.

Salam,

Jakarta [redacted]
Mr. Soesilo: Sw

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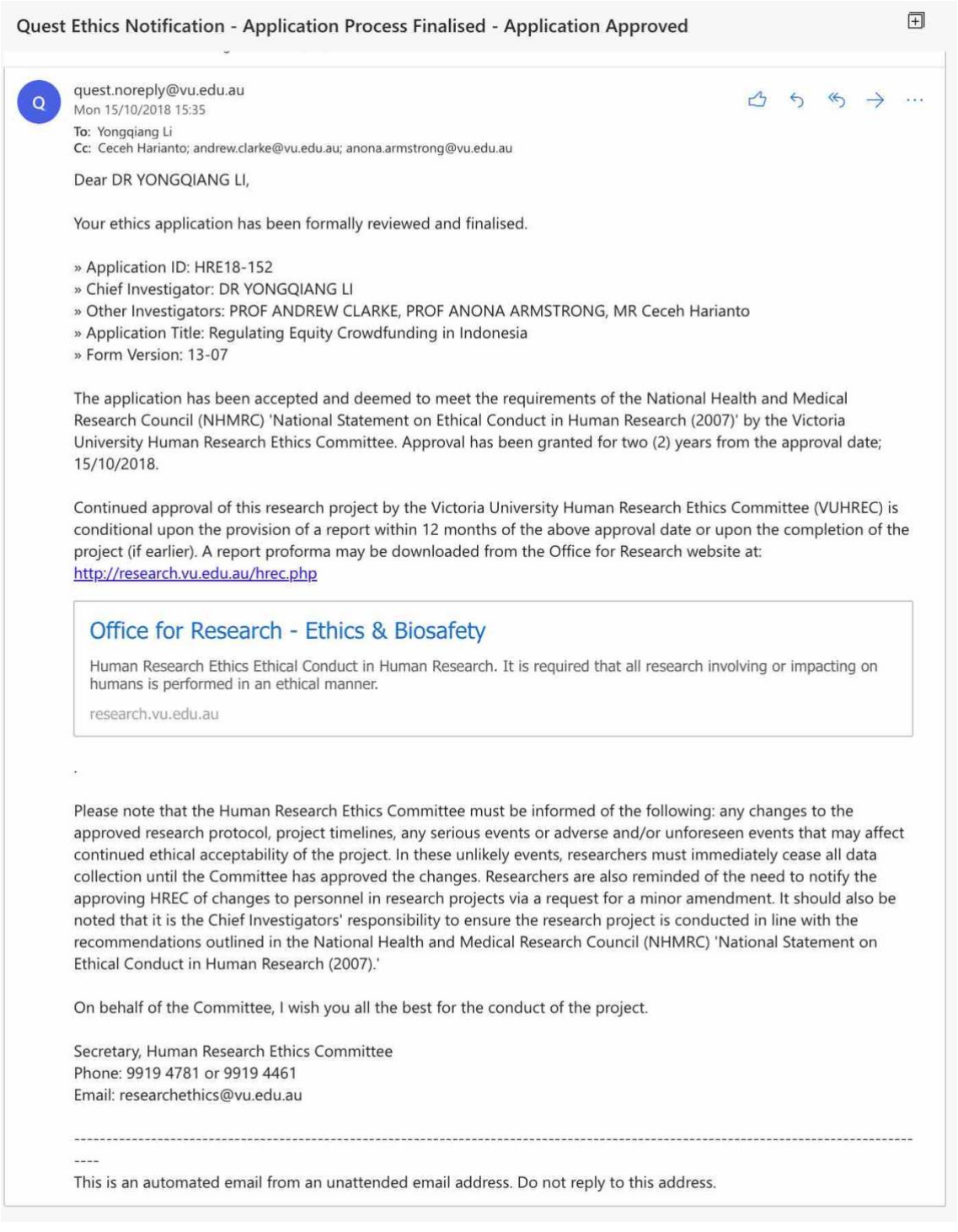
Appendix F: Ethics Approval



Quest Ethics Notification - Application Process Finalised - Application Approved

quest.noreply@vu.edu.au
Mon 15/10/2018 15:35

To: Yongqiang Li
Cc: Ceceh Harianto; andrew.clarke@vu.edu.au; anona.armstrong@vu.edu.au

Dear DR YONGQIANG LI,

Your ethics application has been formally reviewed and finalised.

» Application ID: HRE18-152
» Chief Investigator: DR YONGQIANG LI
» Other Investigators: PROF ANDREW CLARKE, PROF ANONA ARMSTRONG, MR Ceceh Harianto
» Application Title: Regulating Equity Crowdfunding in Indonesia
» Form Version: 13-07

The application has been accepted and deemed to meet the requirements of the National Health and Medical Research Council (NHMRC) 'National Statement on Ethical Conduct in Human Research (2007)' by the Victoria University Human Research Ethics Committee. Approval has been granted for two (2) years from the approval date; 15/10/2018.

Continued approval of this research project by the Victoria University Human Research Ethics Committee (VUHREC) is conditional upon the provision of a report within 12 months of the above approval date or upon the completion of the project (if earlier). A report proforma may be downloaded from the Office for Research website at:
http://research.vu.edu.au/hrec.php

Office for Research - Ethics & Biosafety

Human Research Ethics Ethical Conduct in Human Research. It is required that all research involving or impacting on humans is performed in an ethical manner.

research.vu.edu.au

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Please note that the Human Research Ethics Committee must be informed of the following: any changes to the approved research protocol, project timelines, any serious events or adverse and/or unforeseen events that may affect continued ethical acceptability of the project. In these unlikely events, researchers must immediately cease all data collection until the Committee has approved the changes. Researchers are also reminded of the need to notify the approving HREC of changes to personnel in research projects via a request for a minor amendment. It should also be noted that it is the Chief Investigators' responsibility to ensure the research project is conducted in line with the recommendations outlined in the National Health and Medical Research Council (NHMRC) 'National Statement on Ethical Conduct in Human Research (2007).'

On behalf of the Committee, I wish you all the best for the conduct of the project.

Secretary, Human Research Ethics Committee
Phone: 9919 4781 or 9919 4461
Email: researchethics@vu.edu.au

This is an automated email from an unattended email address. Do not reply to this address.

Appendix G: Interview guide (translation in Bahasa Indonesia)

VICTORIA UNIVERSITY
MELBOURNE AUSTRALIA

Pedoman Wawancara

Judul proyek: Mengatur Layanan Urun Dana Melalui Penawaran Saham Berbasis Teknologi Informasi (*Equity Crowdfunding*) di Indonesia

No	Pertanyaan
1.	Apa kategori terbaik yang menggambarkan anda? Ya Tidak (Silakan centang satu atau beberapa opsi) ☐ ☐ Pegawai pemerintah ☐ ☐ Pegawai otoritas peraturan atau pengawasan ☐ ☐ Investor ☐ ☐ Usaha kecil dan menengah (UKM) / manajer / pendiri perusahaan start-up ☐ ☐ Manajer platform layanan urun dana P2P ☐ ☐ Lembaga keuangan (perusahaan efek, bank, modal usaha, lainnya) ☐ ☐ Lainnya (jelaskan)
2.	Nama organisasi / lembaga (jika ada)
3.	Posisi dalam organisasi/ lembaga saat ini
4.	Jenis kelamin (laki-laki/perempuan)
5.	Tempat tinggal atau pendirian / alamat
6.	Apakah Anda akrab dengan istilah layanan urun dana (*crowdfunding*)? • Ya • Tidak
7.	Apakah anda memiliki pengalaman berpartisipasi dalam kampanye layanan urun dana (*crowdfunding*)? • Ya • Tidak
8.	Jika anda telah berpengalaman berpartisipasi dalam layanan urun dana (*crowdfunding*), bisakah anda menggambarkan pengalaman tersebut? Layanan urun dana (*crowdfunding*) jenis apa?
9.	Dari perspektif anda, apakah anda berpikir layanan urun dana (*crowdfunding*), adalah sarana / instrumen yang baik untuk meningkatkan dana?
10.	Jika layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*) tersedia di Indonesia, apakah anda akan mempertimbangkan berkontribusi / berpartisipasi untuk proyek layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*)?
11.	Apa pendapat anda tentang potensi manfaat layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*): Ya Tidak (Silakan centang satu atau beberapa opsi) ☐ ☐ Pertumbuhan & pekerjaan? ☐ ☐ Pengusaha, UKM dan / atau perusahaan start-up? ☐ ☐ Inovasi ☐ ☐ Penelitian dan pengembangan (R & D) ☐ ☐ Investor kecil / ritel ☐ ☐ Lainnya (tolong jelaskan)
12.	Apakah anda berpikir ada manfaat lain dari layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*)?

Jak[redacted]
Mr. Soesilo[redacted] 1

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13.	Apa pendapat anda tentang berbagai jenis layanan urun dana (*crowdfunding*) (pinjaman / P2P, donasi, layanan urun dana melalui penawaran saham berbasis teknologi informasi (equity crowdfunding)? Apakah menurut anda semua jenis layanan urun dana (*crowdfunding*) berisiko jika tersedia di Indonesia?
14.	Anda memiliki pengalaman / meramalkan akan terjadi risiko jenis apa dari menggunakan layanan urun dana (*crowdfunding*) untuk menaikkan dana?
15.	Apakah menurut anda layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*) memiliki keunggulan tersendiri jika dibandingkan dengan sumber-sumber keuangan lain yang tersedia di Indonesia? • Dibandingkan dengan perbankan konvensional? • Dibandingkan dengan perbankan syariah? • Dibandingkan dengan modal usaha? • Dibandingkan dengan investor malaikat? • Saya tidak punya pendapat apapun
16.	Apa pendapat anda tentang sektor yang diharapkan yang berpotensi memiliki antusiasme untuk menggunakan layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*)? Ya Tidak (Silakan centang satu atau beberapa opsi) ☐ ☐ Seni & desain, fashion ☐ ☐ Produk konsumen, manufaktur ☐ ☐ Pendidikan ☐ ☐ Film, TV & teater ☐ ☐ Keuangan ☐ ☐ Makanan & minuman, restoran & café ☐ ☐ Kesehatan & kebugaran, kesehatan ☐ ☐ Bisnis internet, IT & telekomunikasi ☐ ☐ Media & hiburan, media & jasa kreatif ☐ ☐ Profesional & jasa bisnis ☐ ☐ Eceran ☐ ☐ Olah raga & rekreasi ☐ ☐ Teknologi ☐ ☐ Lainnya (sebutkan)
17.	Apakah menurut anda harus ada pembatasan terhadap jenis UKM atau perusahaan start-up apa yang dapat memiliki akses ke layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*)? 1. Ya 2. Tidak 3. Saya tidak punya pendapat
18.	Jika ada pembatasan jenis UKM atau perusahaan start-up apa yang dapat memiliki akses ke layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*), apa menurut anda kriteria yang tepat? (Silakan centang satu atau beberapa opsi) Ya Tidak (Silakan centang satu atau beberapa opsi) ☐ ☐ Perusahaan muda dan tumbuh? ☐ ☐ UKM usia tertentu (di bawah umur operasi yang anda sarankan?) ☐ ☐ Hanya untuk perusahaan start-up ☐ ☐ Dapat digunakan oleh setiap UKM atau perusahaan start-up ☐ ☐ Lainnya (jelaskan) ☐ ☐ Saya tidak punya pendapat
19.	Menurut anda, berapa usia yang diinginkan dari UKM atau perusahaan start-up yang siap menawarkan

	10% atau lebih banyak saham ke publik? Ya Tidak (Silakan centang satu atau beberapa opsi) ☐ ☐ < 1 tahun ☐ ☐ 1-2 tahun ☐ ☐ 3-5 tahun ☐ ☐ 6-10 tahun ☐ ☐ lebih dari 10 tahun
20.	Apa pendapat anda tentang strategi menggunakan layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*) dan layanan urun pinjaman / Pinjaman P2P untuk pendanaan perusahaan start-up dan UKM, atau menggunakan layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*) dengan sumber pendanaan dari perbankan / modal ventura / investor malaikat (*angel investors*)?
21.	Mana yang cocok untuk UKM atau perusahaan start-up? Apakah menurut anda kombinasi dari banyak sumber adalah cara terbaik untuk membiayai UKM atau perusahaan start-up? Bisakah anda menjelaskan lebih lanjut jawaban anda?
22.	Berbicara tentang potensi risiko di layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*), di mana UKM atau perusahaan start-up menawarkan saham kepada investor ritel, apa pendapat anda tentang pernyataan-pernyataan ini di bawah? Silakan pilih pilihan yang sesuai (sangat tinggi / 5, tinggi / 4, menengah / 3, rendah / 2, sangat rendah / 1) ☐ Sangat sulit untuk menilai proyek, sehingga proyek dapat dinilai terlalu tinggi. ☐ Investor kehilangan uang jika proyek gagal. ☐ Tidak ada jaminan bahwa investor akan dapat memeriksa hak-hak mereka sebagai pemegang saham. ☐ Saham investor akan terdilusi di masa depan karena penawaran saham baru oleh UKM atau perusahaan start-up ☐ Investor akan berkecil hati untuk berinvestasi jika tidak ada strategi keluar yang ditawarkan oleh UKM atau perusahaan start-up sejak penawaran layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*). ☐ Tingkat ketidakpastian apakah UKM atau perusahaan start-up akan menguntungkan pasca-penawaran terlalu tinggi bagi investor untuk berinvestasi di layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*). ☐ UKM atau perusahaan start-up tidak menggunakan dana yang diperoleh seperti yang telah dijanjikan dalam masa penawaran. ☐ UKM atau perusahaan start-up akan mengalami kesulitan untuk memberikan tingkat transparansi tertentu, seperti memberikan laporan keuangan tahunan bagi para investor. ☐ Tingkat kompleksitas investasi di layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*) tidak cocok untuk literasi finansial saat ini dari banyak investor ritel Indonesia.
23.	Selama penawaran layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*) melalui platform layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*), apa pendapat anda tentang risiko ini: Silakan pilih pilihan yang sesuai (sangat tinggi / 5, tinggi / 4, menengah / 3, rendah / 2, sangat rendah / 1) ☐ Penawaran tersebut dapat menyesatkan karena terlalu banyak janji-janji manis tapi akan sulit direalisasikan oleh perusahaan. ☐ Kontributor yang tidak mendapatkan kembali uang mereka bisa merebut kembali dalam hal kampanye yang gagal ☐ Platform atau pemilik proyek mengalami kesulitan untuk melaksanakan penilaian dan uji kelayakan yang benar.
24.	Apakah anda berpikir platform layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*) membawa resiko tersendiri dalam layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*)?

Jakar[redacted]

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	1. Ya 2. Tidak
25.	Apa pendapat anda tentang pernyataan-pernyataan ini di bawah ini, dalam kaitannya dengan potensi risiko di platform layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*): Silakan pilih pilihan yang sesuai (sangat tinggi / 5, tinggi / 4, menengah / 3, rendah / 2, sangat rendah / 1) ☐ Risiko operasional, platform tidak mampu memenuhi kewajiban keuangan mereka untuk UKM / perusahaan start-up atau investor ☐ Layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*) dapat digunakan sebagai sarana baru pencucian uang ☐ Platform tidak akan memberikan masa kontrak yang adil. ☐ Lain risiko (jelaskan)
26.	Apa pendapat anda tentang pernyataan di bawah ini terkait dengan tanggung jawab platform layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*): Silakan pilih pilihan yang sesuai (sangat setuju / 5, setuju / 4, atau setuju atau tidak setuju / 3, tidak setuju / 2, sangat tidak setuju / 1) ☐ Untuk menginformasikan investor dari risiko investasi ☐ Untuk menilai profil dari profil risiko investor, pendapatan, kekayaan, pendidikan, dll ☐ Untuk melakukan uji kelayakan / penilaian risiko kredit proyek ☐ Untuk memantau kinerja proyek setelah kampanye yang sukses ☐ untuk bertindak sebagai calon pemegang saham atau perwakilan kontributor dalam proses hukum terkait dengan proyek ☐ Untuk mengelola konflik kepentingan dalam platform ☐ untuk menutupi kerugian akhirnya kepada investor / kontributor melalui skema kompensasi atau asuransi
27.	Apa pendapat anda tentang tugas / tugas-tugas lainnya dari platform layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*) yang dapat meningkatkan perlindungan investor dan mendorong investor untuk berinvestasi dalam layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*)?
28.	Apa pendapat anda tentang undang-undang dan regulasi layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*) di Indonesia, apakah ada aturan khusus berlaku untuk layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*)? • Tidak ada undang-undang dan peraturan khusus untuk layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*) di Indonesia • Undang-undang nasional yang ada masih cocok dan dapat digunakan untuk menawarkan dan mengoperasikan layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*) di Indonesia • Peraturan saat ini harus diubah/ direformasi untuk membuat layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*) berkembang • Saya tidak punya pendapat apapun Dapatkah anda menjelaskan lebih lanjut?
29.	Menurut anda, hingga jumlah berapa emiten harus dapat meningkatkan ekuitas tanpa prospektus? (Rp dan jangka waktu) (antara Rp ... dan Rp ...). Bisakah anda menjelaskan?
30.	Di bawah rezim peraturan saat ini, apakah platform layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*) memenuhi syarat untuk pembebasan sebagai perantara perdagangan efek atau manajer investasi di Indonesia? Aturan apa yang berlaku untuk platform layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*)?
31.	Silakan tentukan apa yang lainnya akan optimal untuk kerangka peraturan layanan urun dana melalui

Jakarta, [redacted]
Mr. Soesilo-S[redacted]

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	penawaran saham berbasis teknologi informasi (*equity crowdfunding*) di Indonesia, akses ke pasar dan perlindungan investor
32.	Haruskah investor disarankan untuk diversifikasi investasi mereka • Ya • Tidak
33.	Haruskah ada jumlah minimal atau maksimum ditetapkan untuk kontribusi individu? • Ya dengan jumlah maksimum sebesar Rp ... • Ya untuk jumlah minimum Rp ... • Tidak untuk jumlah maksimum sebesar Rp ... • Tidak untuk jumlah minimum Rp ...
34.	Berapa jumlah maksimum / minimum untuk tawaran layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*) yang anda sarankan, jika ada? • jumlah maksimum ... • jumlah minimal ... • Lainnya
35.	Apa langkah-langkah lain akan diperlukan untuk mengatasi risiko bentuk keuangan layanan urun dana melalui penawaran saham berbasis teknologi informasi (*equity crowdfunding*)?

Jak[redacted]
Mr. Soesilo[redacted]

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