

Legal Aspects Of Online Lending And Borrowing Agreements

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Abstract

Through Peer To Peer Lending, we can invest. The purpose of this study is to analyse the responsible parties in the Loan Facility Distribution Agreement on the Tani Fund Platform, along with legal protection for investors. In this research we use juridical-normative research and are descriptive in nature. The result of this research is that based on the agreement on the Tani Fund Platform, the funder is categorised as a lender where the organiser is not responsible for the risk of borrowing and interest losses due to the default of the loan recipient. Legal protection of investors is contained in Article 14 of Law Number 25 of 2007 concerning Capital Investment, in the Capital Market Law. Based on the agreement on the Tani Fund Platform, lenders can conduct deliberations or sue to the general court if there is a dispute with the organiser. Researchers hope that the government can be more optimal in supervising P2PLending platforms in Indonesia, so that organisers do not arbitrarily include the transfer of responsibility in making standard agreements that can harm investors.

Keywords: Legal Protection, Investors, Peer To Peer Lending, Tani Fund Platform

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I. Introduction

Every human being must deal with various choices in choosing the resources they have now and in the future. Investment is a commitment to put in some funds now and aims to get benefits or profits in the future.¹ Currently the use of the internet and business from the internet has grown rapidly, until the legal sector is also asked to intervene and intervene in business via the internet so that order and certainty can be achieved in conducting business activities, in addition to achieving justice for each party to do business. Doing business through the internet is called *electronic commerce (e-commerce)*. *E-commerce* is a process of conducting business activities using electronic technology that connects consumers, companies, and communities in the form of electronic transactions, exchange of goods, services, and information by electronic means.²

Information technology-based money lending and borrowing services is the management of financial services to bring together lenders and borrowers in making lending and borrowing agreements with rupiah currency directly from electronic systems using the internet network.³ *peer to peer lending* is a meeting between creditors and debtors via the internet. *Fintech p2p lending* creates an *online* platform that provides facilities for fund owners to lend directly to debtors with higher returns, while fund borrowers can apply for credit directly to fund owners with easier terms and faster processes than conventional financial institutions. Investment in *p2p lending* promises high returns per year, but investment activities must be in accordance with our profile and *risk appetite* and intelligence in managing it. So, the first step in the process of investing in *p2p lending* is to understand the risks. We should invest funds by assessing the level and type of risk that will occur.⁴

In Indonesia, the legal basis for lending and borrowing has been regulated, namely in Bank Indonesia Regulation Number 19/12/PBI/2017 of 2017 concerning the Implementation of Financial Technology and in article 1765 of the Civil Code which reads "It is permissible to promise interest on loans of money or other goods that are used up due to usage".⁵ Then the OJK (Financial Services Authority) also plays a role in making regulations regarding online lending and borrowing, namely the Financial Services Authority Regulation Number 77/PJOK.01.01. Financial Services Authority Regulation Number 77/PJOK.01/2016 concerning Information Technology-Based Money Lending and Borrowing Services. *TaniFund* is a *peer to peer (P2P) lending platform* that focuses on the agricultural industry in Indonesia.⁶ In the agreement for the distribution of loan facilities on the *platform*, we found several risks to the parties involved. Some articles in the agreement seem to impose risks and losses on the lender and do not provide certainty or legal protection in liability if any party experiences the risk of default or loss.

This paper will discuss the status of the funder categorised as a creditor (lender) or as a financier and the liable party if the agreement is not paid.

II. Research Methods

The research uses normative juridical research to find dogmatic legal truths, requiring secondary data sourced from positive law. The type of data in this research is secondary data with primary legal materials and secondary legal materials. Data collection is done through literature study. This research examines, studies, and examines an online loan facility distribution agreement.

This research data processing uses qualitative methods in the form of thoughts, meanings, the way the author views various symptoms that are the focus of research to obtain the embodiment of the meaning system.

III. Results And Discussion

Creditors and Investors (Financiers)

Credit is the supply of money or bills, based on an agreement in lending and borrowing between a bank and another party that requires the borrowing party to be able to repay its debts after a certain period of time with interest. The definition of borrowing is a contract in which one party gives another party a certain amount of goods that run out due to use, on the condition that the latter party will return the same amount of the same type and quality⁷.

So what distinguishes between credit and lending is the provision of interest. A credit agreement must include interest in it, while a loan agreement does not require the loan of money to be accompanied by interest. Lending can be interpreted as lending a certain amount of money within a certain period of time and with interest.

In this case, the person who lends a certain amount of money to the borrower is called a creditor. Law Number 37 of 2004 concerning bankruptcy and postponement of debt payments, creditors are people who have receivables caused by agreements or laws that can be collected in court. Then in Article 2 paragraph (1) of Law Number 37 of 2004, what is meant by creditors in this paragraph is both concurrent creditors, separate creditors and preferred creditors contained in the Civil Code, namely:

Concurrent Creditor

In Article 1132 of the Civil Code, there is a definition of concurrent creditors, namely creditors with rights are creditors jointly to obtain repayment (without any precedence) and are calculated based on the amount of their respective receivables compared to their receivables as a whole, against the overall assets of the debtor.

Preferred Creditor

The definition of this creditor is a creditor who, due to the nature of the receivable, gets repayment first and has a privilege, namely a right given by law to a person who is in debt so that his level is higher than the person whose debt is privileged, as written in Article 1139 of the Civil Code.

Separate Creditors

A *secured creditor* is a creditor who holds a *secured creditor* and must get a refund first compared to a preferred creditor, which is a creditor who has special rights or the right to be preceded (*preferred creditor*), unless the law determines otherwise.⁸

Investment is the implementation of the national economy which is placed as an effort to increase national economic growth, create jobs and encourage the people's economy domestically and abroad.⁹ The definition of investment means activities carried out by *natural persons* (*natural persons*) or legal entities (*juridical persons*), which aim to increase and maintain the value of capital, which can be in the form of cash (*cash money*), equipment (*equipment*), immovable assets, intellectual property rights, and also expertise that will get results / profits. Investment is the activity of investing capital, both by Domestic Investors and to conduct business in the territory of the Republic of Indonesia.¹⁰ Capital is the entire inventory (*stock*) of productive capacity that can be utilised by a country or households in it. While the definition of capital according to Law No. 25 of 2007 is an asset in the form of money or other forms that are not money and are owned by Investors who have economic value.

Based on understanding, there is a fundamental difference between creditors and investors. In business, investors are parties either individuals or institutions originating from within or outside the country that carry out investment activities that are long-term or short-term with the aim of making a profit. Meanwhile, Investors or commonly called investors according to Article 1 paragraph (4) of Law Number 25 of 2007 concerning Capital Investment are individuals or business entities that make Investments which can be in the form of Domestic Investors as well as Foreign Investors.

When viewed from the definition of creditors in Law Number 37 of 2004 concerning bankruptcy and postponement of debt payments, the lender in the *TaniFund platform* is categorised as a creditor (lender) who has a receivable due to an agreement whose repayment includes interest. And in article 1132 of the Civil Code it is also written that concurrent creditors are creditors who have the same position over the repayment of debts from the debtor's assets without any precedence in accordance with the explanation stated in the loan facility distribution

agreement in article 1 letter (H) which reads "Lenders are lenders who have receivables due to the Lending and Borrowing Agreement through the *TaniFund Platform*".

Parties to the Loan Facility Disbursement Agreement on the *TaniFund Platform*

In the Loan Facility Disbursement Agreement, the parties first explain:

1. Penyelenggara is a company engaged as an information technology-based money lending and borrowing service provider as referred to in POJK No. 77/2016 which has been registered and supervised by OJK with Registration Certificate Number S- 278/NB.213/2018 dated 20 April 2018.
2. Lenders are individuals who intend to place and channel their funds for lending directly to loan recipients through the *Platform*.
3. The Lender hereby intends to cooperate with the Organiser, which acts as a regulator of loan facility distribution transactions, to provide loans to Loan Recipients via the *Platform* and the Organiser has agreed to the Lender's intention.

Article 1 letter (i) states that the Borrower is an individual or legal entity that has a debt due to a Borrowing Agreement through the *TaniFund Platform* to fund a cultivation project in agriculture.

In article 5.3 of the loan facility distribution agreement, it is stated that the payment or repayment of the loan facility received by the creditor consists of: Principal of the loan facility; Interest; Penalty (if any); and Other fees (if any).

However, according to the contents of the agreement in article 9.1 letter e, it states "The organiser is not responsible for all risks of lending, compensation, costs, fines / interest due to the default of the loan recipient including the risk of default, in accordance with the lending agreement where it is fully borne by the lender". And reaffirmed in article 9.2 letter (a) which states "The lender understands and realises and bears the entire risk of lending and borrowing including interest due to the default of the loan recipient including the risk of default, based on the lending and borrowing agreement which is borne entirely by the lender.

In other words, the organiser is not responsible for the risk of lending or loss of fines and interest due to the default of the loan recipient because the organiser is only a liaison between the lender and the loan recipient through the *Tanifund Platform*. And the lender also knows that all losses or risks that occur in the agreement, the lender bears its own risk without involving the organiser because the organiser's position is only a liaison through the *Tanifund Platform*.

Under the agreement, it is the organiser who is liable for the unpaid principal investment amount. In this case, the organiser must first obtain power of attorney from the lender to make collections, receive payments and others, which are related to what is needed to settle the obligations of the loan recipient for his loan. Article 6.2 reads "The Lender shall make and sign separately the power of attorney, appointment, authorisation and any other documents to enforce the power of attorney, appointment and/or authorisation granted to the Organiser."

So, with this power of attorney, the organiser can make collection efforts against the loan recipient to immediately make payments on the principal loan borrowed. This provision is based on article 6.1 letter e, namely "The Lender hereby appoints and appoints the Organiser, irrevocably, as a true and valid power of attorney with full power to collect against the Borrower for the repayment of the loan facility under the Borrowing Agreement accompanied by the right of substitution to appoint or transfer power to other parties to carry out collection efforts."

However, researchers found irregularities that resulted in losses to lenders in the Loan Facility Distribution Agreement on the *TaniFund Platform*. As mentioned in article 6.1 letter e: The organiser will make collection efforts to the loan recipient, but in article 9.1 letter e states that the organiser is not responsible for all risks of borrowing, compensation including interest due to or default of the loan recipient including but not limited to the risk of default. Which means that the organiser is only responsible in terms of loan collection efforts and if the loan recipient is still unable to make payments on the loan, the organiser is not responsible for this and the risk of default experienced by the loan recipient is borne entirely by the lender. This is not in accordance with the Financial Services Authority Regulation number 77 /POJK.01/2016 concerning Information Technology-Based Money Lending and Borrowing Services Article 36 paragraph (1) which explains that the Organiser must prepare a standard agreement based on the provisions of the laws and regulations." Then paragraph (2) explains that "The standard agreement as in paragraph (1) of the Organiser is prohibited: include the transfer of responsibility or obligation of the Organiser to the User."¹¹

In this case, the standard agreement is an agreement made in a unilateral manner by the organiser which is understood and agreed by the loan recipient.

Legal Protection of Investors

Financial companies and institutions help households and companies to save, facilitate complex payment mechanisms across various elements of the economy. Therefore, it is often highlighted that the failure of financial institutions can severely disrupt economic activity in Indonesia.¹²

To ensure legal protection for Investors, the government has regulated the Rights of Investors as stipulated in Article 14 of Law Number 25 of 2007 concerning Capital Investment which stipulates that Investors are entitled to receive (a) certainty of rights, legal certainty, and certainty of protection; (b) open information about the business field they are running; (c) the right to service various forms of facilities and facilities in accordance with the law. in accordance with provisions of the regulation.

The above law is a guarantee of legal certainty for various parties carrying out activities in the capital market and protection for investors in Indonesia. However, Indonesia does not yet have a special regulation regarding legal protection for investors who invest online, but in the Capital Market Law there are legal sanctions for parties who carry out activities in the Capital Market, in the form of Administrative, Criminal and Civil sanctions. Civilly, listed in article 111 of Law No.8 of 1995 concerning the Capital Market which reads "Any party who suffers a loss as a result of a violation of this law and its implementing regulations can claim compensation, either alone or together with other parties who have similar claims, against the party / parties responsible for the violation.". From the sound of the article, it can be understood that the injured party can ask for responsibility in the form of compensation to the party who committed the violation.

In the Loan Facility Disbursement Agreement on the TaniFund Platform, it is stated that if there is a dispute between the parties regarding the agreement, it will be resolved by deliberation which is written in article 15.2 which reads "In the event of a dispute between each party to this Agreement as well as matters regulated in relation to this agreement and / or the implementation of and / or interpretation of this agreement, each Party seeks to resolve the dispute by deliberation". And if by deliberation the dispute or dispute cannot be resolved then in article 15.3 article

15.4 it is written that one party or the parties together can submit the dispute or dispute to the South Jakarta District Court, and the Organizer will try in good faith to resolve the dispute by deliberation. Article 15.5 also states that if the dispute or disputes referred to in article 15.4 are not resolved by deliberation within a period of 30 days, the conflict originating from or in connection with the loan agreement can be resolved in the general court institution whose legal domicile is determined according to the agreement between the lender and the loan recipient.

In the event that the Organizer ceases operations, it is stated in article 16.3 of the Loan Facility Distribution Agreement that "Against funds from the Borrower as a repayment of the Borrower for the principal of the loan facility and interest but has not been forwarded to the Lender, the Organizer will immediately make a return of the principal of the loan facility and interest to which each relevant Lender is entitled." Based on the contents of the article, it can be understood that the organizer must still be responsible for the principal and interest to which the lender is entitled if PT TaniFund stops operating, the organizer is still obliged to return the principal amount of investment and interest. If the Organizer does not return the principal and interest to the lender, the lender can take legal action based on article 16.3 of the agreement.

IV. Conclusions

In the Loan Facility Distribution agreement on the TaniFund Platform, the funder can be categorised as a creditor or lender because the return on funds provided or invested in the TaniFund platform is in the form of the principal investment amount accompanied by interest. And if the principal investment amount in the agreement is not paid, the organizer is responsible. Likewise, with unpaid interest, the organizer is responsible with the provision that the lender must make a separate power of attorney first so that the organizer can collect the principal and interest from the loan recipient. But this provision only applies in the event that the organizer stops operating based on the Loan Facility Distribution Agreement on the TaniFund Platform article 16.

If the recipient of the loan does not pay his debt (the amount of principal investment and interest) in other words the recipient of the loan defaults, then the organizer is not responsible for this, the lender must swallow the bitter pill, namely accepting and bearing all the risks of losses for default (broken promises) made by the recipient of the loan, including default. This is stated in article 9.1 of the Loan Facility Distribution Agreement on the TaniFund Platform.

Regarding online lending and borrowing agreements, there is no specific regulation governing this matter, but Law Number 8 of 1995 concerning Capital Markets can be the basis for legal protection, especially for investors or investors. based on this Law, there are legal sanctions that can be given to the organizer if it violates the law or investors suffer losses, including criminal and civil administrative sanctions. Civilly, parties who violate the law can be held liable in the form of compensation.

Literature

- [1]. Indonesia Civil Code.
- [2]. Law Number 25 Year 2007 On Capital Investment.
- [3]. Financial Services Authority Regulation No. 77/Pjok.01/2016 On Information Technology-Based Money Lending And Borrowing Services.