



PROCEEDING SEMINAR ON LAW AND SOCIETY 2022 (SOLAS VI)

THEME:

**SUSTAINABILITY IN SOCIETY: LEGAL
RESPONSE**

8 - 9 NOVEMBER 2022

**SCHOOL OF LAW
UNIVERSITI UTARA MALAYSIA**



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UTARA MALAYSIA**

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PREFACE

Seminar on Law and Society (SOLAS) is a series of annual seminar conducted by School of Law (SOL), Universiti Utara Malaysia. The primary aims of Seminar on Law and Society 2022 (SOLAS VI) is to provide a platform for academics, researchers, practitioners and industrial players to share knowledge and ideas, widen networking, present their research findings, experience and expertise as well as to explore any other potential benefits that might contribute for the sustainability in society. This year is 6th Series of SOLAS. The first SOLAS was held in 2016. The theme for SOLAS this year is **"SUSTAINABILITY IN SOCIETY: LEGAL RESPONSE"**.

The sustainability in society is to ensure the balance of development economic growth with social inclusion and environmental sustainability, based on solid institutional foundations, conditions for peaceful societies and the realization of human rights. Thus, the legal landscape needs to catch up with SDG's mandates to ensure the balance of sustainability in society. As the law is created and put into practice through societal processes, the perspective of the mutual relationship between law and society is currently extended to different actors, institutions, processes and landscapes.

The Sustainable Development Goals (SDG's) is a new, universal set of goals, targets, and indicators that United Nation (UN) member states will be expected to use to frame their agenda and political policies over the next 15 years (2016 – 2030). With its 17 Goals, 169 Targets and more than 200 Indicators that cover 5 dimensions namely People, Planet, Prosperity, Peace and Partnership. The SDGs will stimulate action over the next fifteen years in areas of critical importance for humanity and the planet. Among the mandates of SDG's are a call to action to end poverty, protect the earth's environment and climate, and ensure that people everywhere can enjoy peace and prosperity. The mapping of SDGs with 11th Malaysia Plan strategic thrust and six policy pillars under the Mid Term Review involving the integration of the national development plan's action plans, initiatives and outcomes to the SDGs' goals, targets and indicators.

SOLAS VI is very fortunate to receive forty scholarly works that cover various aspect of daily life in the society. I am pleased to present to all of you, a compilation of those works, the SOLAS VI Book of Proceedings that is divided into six area of discussions. I do hope that this Book of Proceedings will be beneficial to all readers. Finally, I wish to express my utmost appreciation and congratulate all writers for their contribution in this Book of Proceedings.

Asmar Abdul Rahim et. all

Editors

Proceedings: Seminar on Law and Society 2022 (SOLAS VI)

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PART VI
INDUSTRY, INNOVATION, AND INFRASTRUCTURE

**COMPARISON REGARDING INVESTOR PRIVACY LEGISLATION IN
EQUITY CROWDFUNDING BETWEEN MALAYSIA AND INDONESIA**

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ABSTRACT

Equity crowdfunding (ECF) has emerged as an alternative funding channel for startup firms. It involves fundraiser by investors to finance business activities on internet in Indonesia while in Malaysia it raises funds for small businesses from the public on websites registered with the Malaysian Securities Commission. In lieu with this is the necessary legislative to protect investor privacy engaging in ECF which based on internet platforms. This is a comparison study between Malaysia and Indonesia regarding investor privacy legislation in ECF activities. This study applied normative legal research that focuses on positive legal norms, in-laws, and regulations. In its findings, more investments via ECF arose after the introduction of legal protections in Malaysia. Whereas Indonesia is regulated by unclear protective treatments which has no clear regulations on investor privacy protection. Therefore, P2P lending platforms operating in Indonesia is required to comply with Indonesian laws and regulations relevant to their activities, location, and legal structure.

Keywords: Malaysia, Indonesia, investor privacy, Equity crowdfunding (ECF).

INTRODUCTION

The ease of technology affected the service space in finance known as Financial Technology (FinTech) which developed more innovative financial and information technology (Wang et al., 2021). The development of FinTech technology has continued to dominate the financial system in recent decades (Li et al., 2020). This influence encouraged financial firms to leverage and invest their money to remain competitive (Lee & Shin, 2018). The study focused on how Malaysian and Indonesian laws protect the investor privacy in Equity crowdfunding (ECF), online business lending platforms. The terms investor privacy and investor data protection are often used interchangeably, but there is an important difference between the two. Investor privacy defines who has access to data, while investor data protection provides tools and policies to actually restrict access to the data.

METHODOLOGY

The research is conducted using normative legal research on existing legislation, the analysis of a statutory substance on legal issues in its consistency with existing rules (Mahmud Marzuki and Peter Mahmud, 2011). This refers to law interpretation and the purposive approach by describing legislation relevant to ECF. This study also uses a comparative approach by comparing the legislative implementation of ECF in Malaysia and Indonesia regarding investor privacy.

RESULTS AND DISCUSSIONS

COMPARISON BETWEEN MALAYSIAN AND INDONESIAN LEGISLATIONS

Comparisons are made in terms of four aspects: legislative framework, privacy protection authorities, breaches of privacy protection and exempt sectors.

Legislative Framework

The legislative framework in Indonesia relied on whether the data protection law is based on international instruments on privacy or data protection. The protection of personal data in Indonesia was initially focused on the protection from privacy perspective. Under the Indonesian Constitution, the concept of privacy rights has been recognised and protected as part of the general concept of human rights (Tisnadisastra, Adwani, & Adi, 2019). With the need to cover the sector yet to be regulated, specifically that of the internet and electronic transaction related activities, Law No. 11/2008 on Electronic Information and Transactions as amended by Law No. 19/2016 (collectively, the EIT Law) was passed. Even though most of the provisions of the EIT Law focus on electronic transactions, there is a notable provision that deals with personal data and privacy in the EIT Law.

Referring to Tisnadisastra, Adwani, & Adi, (2019), Indonesia refers to EIT Law, GR 82, MOCI Regulation 20, and FSA 77/2016 which cannot guarantee the validity and reliability of personal data and privacy protection due to unclear regulations on personal data and privacy protection; it is regulated by unclear protective treatments and no strict sanction. Malaysia, on the other hand, since 2013 has developed Personal Data Protection Act 2010 (PDPA 2010) which not only protects personal data and privacy but also imposes sanctions.

MoCI Regulation 20 is issued as mandated under article 15(3) of Government Regulation No. 82/2012 on the Implementation of Electronic Systems and Transactions (GR 82), which requires personal data protection in electronic systems to be regulated by a Ministerial Regulation. MoCI Regulation 20 came into effect on 1 December 2018, and it applies only to personally identifiable information (PII) stored in electronic systems, but not to PII that is stored manually.

In Malaysia, The Central Bank of Malaysia (BNM) and SC are the main regulatory bodies that govern licensing and marketing requirements for fintech companies (Kandiah, 2019). In 2016, the SC had established management responsibilities in dealing with cyber risks, including (1) maintaining the confidentiality and sensitivity of entity data; (2) protecting information vulnerabilities and operating systems of the entity; (3) preventing existing and future cyber threats (Securities Commission Malaysia, 2016a).

Privacy Protection Authorities

Commonly, other jurisdictions formed their data privacy protection regulations based on international instruments (eg, the EU General Data Protection Regulation (GDPR)). The current data privacy protection law regime in Indonesia is still less developed. MoCI Regulation 20 does not recognise a number of concepts, such as, privacy by design, automatic processing, data controller, data processor, sensitive personal data and dedicated data protection officer. Nevertheless, certain general principles in GDPR related to the processing of personal information have been adopted by MoCI Regulation 20, *inter alia*, lawfulness, confidentiality, the purpose of limitation, accuracy and storage limitation.

The legislation of personal data privacy is also included in several laws and regulations, though most of these laws and regulations only address privacy protection briefly:

- Law No. 7/1992 regarding Banking as amended by Law No. 10/1998 (the Banking Law);
- Law No. 39/1999 regarding Human Rights;
- Law No. 23/2006 regarding Resident Administration as amended by Law No. 24/2013 (the Resident Law);
- Law No. 36/1999 regarding Telecommunications (Telecommunications Law);
- Law No. 14/2008 regarding Transparency of Public Information;
- Law No. 36/2009 regarding Health (the Health Law);
- Minister of Health Regulation No. 269/Menkes/Per/III.2008 on Medical Records (MoH Regulation 269);
- MoCI Regulation No. 36 of 2014 on the Registration Procedure of Electronic System Operator; MoCI Regulation No. 4 of 2016 on the Information Security Management System (MoCI Regulation 4) (Tisnadisastra, Adwani, & Adi, 2019).

Given the need to have a dedicated data and privacy legislation in force, the Indonesian government and House of Representative have included a personal data protection bill (the PII Bill) in the national legislative programme (Tisnadisastra, Adwani, & Adi, 2019).

Malaysia became the first Country in Southeast Asia to legislate on ECF in 2015 by issuing six licenses for the ECF platform (Rahman, 2020). ECF related regulations in Malaysia are regulated in the Capital Market and Service Act (CMSA) 2007, which was read in conjunction with CMSA Subdivision 4 Division 2 Part II and Guidelines on Regulation of Markets (GRM) under Section 34 of CMSA (Item 1.01 GRM) issued by the Securities Commission (S.C.). Section 15(g) of the Securities Commission Malaysia Act 1993 (Incorporating latest amendment-Act A1539/2017) explains that the function of this regulation is to regulate the activities of the ECF and protect the interests of the parties involved, especially investors. In obtaining a license issued by the Securities Commission, the ECF platform operator must meet the criterias set out in the GRM first (Item 2.01 GRM).

Although ECF activities in Malaysia have been regulated in the Guidelines on Regulation of Markets under Section 34 of the Capital Market and Services Act ("Guideline 34") issued by the Securities Commission of Malaysia, there are some weaknesses in the regulation because it does not regulate the protection of personal data and the privacy of ECF investors specifically, where personal data protection and privacy settings are regulated separately in the Personal Data Protection Act 2010 (PDPA 2010). If personal data is processed outside Malaysia, PDPA 2010 will not apply.

Seven principles make up Personal Data Protection, including General Principles, Notification and Choice Principles, Disclosure Principles, Security Principles, Retention Principles, Data Integrity Principles and Access Principles as set out in sections 6,7,8,9,10,11 and 12 (Part 5 paragraph (1) of the PDPA). Furthermore, third parties' data processing, including data users, data processors, or persons authorized in writing to process personal data under the direct supervision of data users, is set out in section 47 of PDPA 2010 (Baskaran, 2020). Furthermore, data stored in the ECF platform during the ECF investor account registration process is also subject to PDPA regulations 2010. At the time of data processing by the ECF Organizer/Platform in Malaysia, an investor data user in ECF activities must pay attention to the seven Principles of Personal Data Protection.

Breaches of Privacy Protection

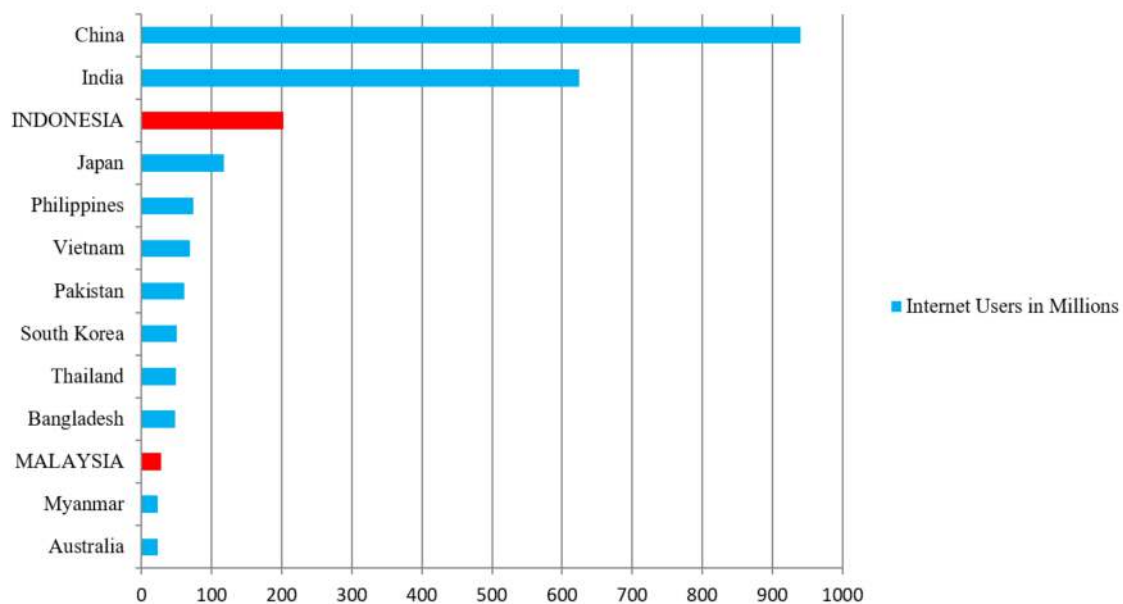
ECF is the financing efforts by some people on creative ideas through online sites (Pietro et al., 2021). ECF services are categorized as a contributing factor for businesses that need

financial assistance in the form of investments (Hornuf & Schwienbacher, 2018). Indonesia and Malaysia are two countries that utilize ECF technology.

The presence of the internet dramatically affects human activity. Indonesia and Malaysia are the highest internet users of the 13 countries in the Asia Pacific region. Based on data, Indonesia ranked third highest with 202.6 million users, while Malaysia ranked eleventh with 27.43 million users. The information is contained in the Figure 1 below:

Figure 1.

The number of internet users in the Asia Pacific Region as of January 2021, by Country.
Source: Statista.com (2021).



In Indonesia, data leakage and investor privacy cases are resolved using Law No. 19 of 2016 on Amendments to Law No. 11 of 2008 on Information and Electronic Transactions. Through this regulation, the occurrence of personal data and privacy is subject to administrative sanctions. The form of administrative sanctions given is account blocking. The author considers that the above sanctions are ineffective. Ineffectiveness occurs because there will be a repetition of the same activity with different platforms. The purpose of sanctions is to provide a deterrent effect to reduce the crime rate. If only limited to site blocking, this will not be effective and continues to be done considering that creating a new site does not require burdensome requirements.

According to Abdullah (2018), the regulation of equity-based funds in Malaysia is regulated in the Guidelines on Regulation of Markets under Section 34 of the Capital Market and Services Act Services Act 2007 (CMSA 2007) issued by the Malaysian Securities Commission in 2015, making Malaysia the first country in the Asia-Pacific to legislate ECF. ECF operators play a role in ensuring quality businesses with sound business plans and sufficient due diligence has been undertaken before a company can be accepted into the ECF platform (Abdullah, 2018). In Malaysia, the protection provided in ECF activities also covered information disclosure and exemption from the obligation to issue prospectus as referred to in Section 232 Capital Market and Services Act (CMSA) 2007.

In Indonesia, arrangements related to the implementation of ECF have not explicitly been regulated in the law, but only at the level of Financial Services Authority (OJK) Regulations. The implementation of ECF itself uses an electronic system where everyone can access the

platform and even hack the ECF platform site. Although the Ministry of Communication and Informatics of the Republic of Indonesia requires that the Organizer must have a permit for the Implementation of Electronic Systems, this rule is only a form of effort to collect data from the Government and not a system device for cyber security, meaning it is not a form of absolute protection from the Government against the protection of investors' privacy. Legal certainty of personal data and privacy protection is still not available or has not been passed.

While in Malaysia, arrangements related to the implementation of ECF have explicitly been regulated for financial technology companies to protect investors' privacy. This form of protection is guaranteed in Guideline 34 Article 11 paragraph (5) letter j, which requires ECF organizers to maintain data and privacy on online platforms related to ECF activities following the Personal Data Protection Act 2010 (PDPA 2010). Thus, Malaysian ECF illustrates a significant difference compared to Indonesia. There are 10 ECF platforms registered and obtained business licenses in Malaysia as ECF organizers (Capital Markets Malaysia [CMM], 2020). While in Indonesia, only two platforms are officially registered and get permission from the Financial Services Authority (OJK) as ECF organizers.

In sections 104 and 105 of the PDPA 2010 explaining the investigation process by the commissioner, after the commissioner receives the complaint, they will conduct an investigation related to the relevant data used to determine whether the actions specified in the complaint conflict with the PDPA 2010. If the complainant is not satisfied (aggrieved), he can appeal. Furthermore, if data users are dissatisfied with the Decision of the Personal Data Protection Advisory Committee, they can file a review of the decision in the High Court of Malaysia (Butarbutar, 2020).

Exempt Sectors

Depending on the relevant regulatory framework and internet platforms, investors invest directly using a fiduciary account/escrow account with a unification contract (Tiberius, 2021). This involves many personal and privacy information which should be confidential.

The term personal data in its application is known as privacy through the term "the right to be alone" initiated by an American judge named Thomas Cooley in 1879 based on two things, namely personal honor that concerns the values of dignity, autonomy, and self-centered person and personal independence. Privacy is an individual or group's claim to limit the extent, when, and how information about him or she is published to others (Goad et al., 2021). Personal data collects a person's confidential, private, professional, commercial, and public information (De Terwangne, 2021). Galič & Gellert (2021) refers to information on identification either directly or indirectly concerning name, identification number, location data, social identity, genetic, physiological, economic, cultural, and mental. Such privacy should be protected (Galič & Gellert, 2021).

In Indonesia, the protection of personal data and privacy has been guaranteed in the Indonesian constitution. The provisions of Article 28G state unequivocally that recognizing the right to protect personal self, family, honor, dignity, and property is in its control. This rule was born because of the recognition of human rights values regulated very complexly in the 1945 Constitution and the appreciation of individual rights (Shalihah, & Shariff, 2022). In addition, Indonesia's involvement as a party state of the International Covenant on Civil and Political Rights (ICCPR), which has been passed through Law No. 12 of 2005, also affirms the obligation of the Indonesian Government to protect the privacy and personal data of its citizens. Therefore, in ensuring every right that the 1945 Constitution has granted, additional arrangements are needed that further strengthen the guarantee of privacy and personal data

security and ensure the implementation of a stable and conducive business climate (Shalihah, & Shariff, 2022).

The issuance of this rule is not accompanied by more specific rules related to data protection and privacy of investors who register themselves on online platforms in ECF activities, giving rise to various concerns that continue to overshadow every step of the parties involved. Like coins that have two opposite sides, ECF activities and having a profitable side also have conflicting sides that have the potential to pose risks. This can be seen in the high level of wiretapping, break-ins to cybercrime that often afflict online sites (Chrismastianto, 2017).

Previously, lawmakers had drafted a Bill (Bill) related to Personal Data Protection (PDP). However, the discussion stalled halfway through for reasons that have not yet been ascertained (Sinaga & Putri, 2020, Shalihah, & Shariff, 2022). The phenomenon as above is understood that law enforcement cannot be done statically, so in its application, it needs to be developed in a broader context until it enters the realm of business, social and technical activities.

In contrast, the personal data protection laws in Malaysia are comprehensive and orderly that sanctions are quickly determined for violators through PDPA 2010, including those that violate sensitive personal data (Cieh, 2013) and cases related to fintech (Bromberg et al., 2017). PDPA 2010 adheres to the principles of the e-government security legal framework which includes general principles, disclosure, notification and choice, data integrity, security, retention, and data access (Sonny, 2012). Likewise, the 1998 Malaysian Communications and Multimedia Law must also be complied with by financial institutions, insurance companies, aviation service providers, and licensees (Chambers & Partners, 2019). On December 23, 2016, the commissioners completed and registered the Personal Data Protection Practice Code for the Insurance/ Takaful Industry. Then, on January 19, 2017, the commissioners completed the Personal Data Protection for the Banking and Financial Sector. Furthermore, on November 21, 2017, the Commissioners completed the Code of Practice for the Transportation (Aviation) Sector (Chambers & Partners, 2019, Butarbutar, 2020).

REGULATORY HURDLES

Lawful reporting practices

Regulatory hurdle need to be overcome before ECF platform may post an individual's credit score. Regulatory compliance must first be squared away with a platform's legal team. Platforms should ensure that their reporting practices are lawful. Public releases of consumer credit information by financial institutions including ECF platforms must be governed. Each financial institution should have an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information (Tisnadisastra, Adwani, & Adi, 2019).

In implementing ECF activities, the need for data protection must be made to reduce the risk of theft or misuse of personal data without consent. Malaysia has established protection of personal data through the Personal Data Protection Act (PDPA) 2010, which was successfully implemented in 2013 under the supervision of the Personal Data Protection Commission (PDPC) (Shahwahid & Miskam, 2015). To become an operator of the ECF Platform, the company must obtain a license from the Securities Commission of Malaysia. In Malaysia, SC regulates financial technology such as the ECF Platform as an intermediary between investors and issuers (Butarbutar, 2020).

Investor Privacy

Investor privacy is rather tricky as mentioned by Tisnadisastra, Adwani, & Adi (2019). One of the causes of the difficulty of privacy is the lack of public awareness of privacy. Social networks make privacy a shared consumption. Privacy is no longer something expensive that makes its existence must be kept secret. Even a cynical culture of society is further expanding the dissemination of privacy-related information. Regarding the implementation of ECF, the security of the applications used is still not stable. The security system used can still be entered by other parties by damaging the existing system for a specific purpose. System destruction can only be done by professionals using barcodes or barcodes.

When deciding to join a platform of choice, investors are burdened with filling in some data, including contact information in the form of emails and phone numbers that facilitate access to communication between both parties. This access aims to provide direct and open information about obstacles and achievements during cooperation. In addition, the provision of information directly to investors that are not submitted through the platform indicates that the investor's privacy space is maintained. In addition, the data submitted on the site will invite someone's attention, so it is better conveyed personally to the investor itself.

In findings, Indonesia and Malaysia have different drawbacks in the legislation protecting investor privacy in ECF activities. Indonesia encounters conflicting legal rules in the application of personal data protection and investor privacy in ECF activities. Malaysia, which has been more advanced, have specific rules regarding investor privacy protection policies in the 2010 PDPA but it is far from perfect. Imperfections are present due to the widespread opportunity of third parties to access investor data. Through broad authority, abuse becomes inevitable.

CONCLUSION

Fundraising services become one of the best solutions in developing the company's business and projects. ECF is a fundraising service that gives space to a person or group of people in helping a company or project that needs financial assistance in the form of equity using internet platforms (Milian et al., 2019). Internet platforms involve data and privacy issues which are interrelated. However, the definition of privacy has a broader understanding as its include an action taken against a person's data. Personal data and privacy need to be protected.

Law enforcement is still struggling to resolve personal data and investor privacy issues in Indonesia. Personal data protection and privacy in Indonesia counters some obstacles in the enforcement of protection thus have not been maximized. As regards to ECF, Indonesia lacked specific legal rules governing the protection of personal data and privacy, plus the absence of strict sanctions related to personal data protection and privacy.

In its findings, the protection of personal data and investor privacy on ECF in Malaysia is specifically regulated in PDPA 2010. Despite this, cases of personal data and privacy theft in Malaysia are still high compared to Indonesia due to the lack of legal awareness for the ECF platform organizers in implementing the provisions set out in the PDPA 2010.

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