

Conference Paper

Criminal Accountability False Investments with Ponzi Schemes in Indonesia

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Abstract.

Indonesia is currently experiencing a surge of investments, which is resulting in both positive and negative outcomes. Supported by increasingly fast technology, “investment” activists are even more enthusiastic about continuing to develop their investments. Recently, investment activists have faced various forms of fraudulent investment with Ponzi schemes. This study aims to determine criminal liability in investing in Ponzi schemes in Indonesia and the protection measures that can be provided for victims. Using normative legal research methods, it was found that fraudulent Ponzi scheme investors in Indonesia can be charged with Article 378 of the Criminal Code. And, because they do not have a permit, fraudulent investments can be subject to Article 103 of Law Number 8 of 1995 concerning Capital Markets, related to investment victims, falsifying a Ponzi scheme in an application because it uses electronic media can be subject to Article 28 paragraph 1 of Law Number 11 of 2008 concerning information and electronic transactions, which has been amended by Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning information and electronic transactions.

Keywords: investment fraud, Ponzi scheme, criminal liability

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1. INTRODUCTION

In today's modern era, the thing that cannot be avoided is the development of technology and information which is getting more advanced from time to time. The story of technology and data has encouraged the result of one of them in the capital markets field.

The development of the capital market in Indonesia is very rapid. Capital is an inseparable component of economic development activities. For developing countries, capital adequacy is a problem. To obtain capital, companies can issue and sell capital market securities to attract funds from the public. With a capital market, parties with excess funds can invest these funds in the hope of obtaining returns in the form of

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dividends. At the same time, companies can use these funds for investment purposes without waiting for funds to be available from the company's operations.[1]

Investments now mushrooming in Indonesia give birth to two opposite sides, positive and negative. Supported by increasingly fast technology, "investment" activists are even more enthusiastic about continuing to develop their investments.

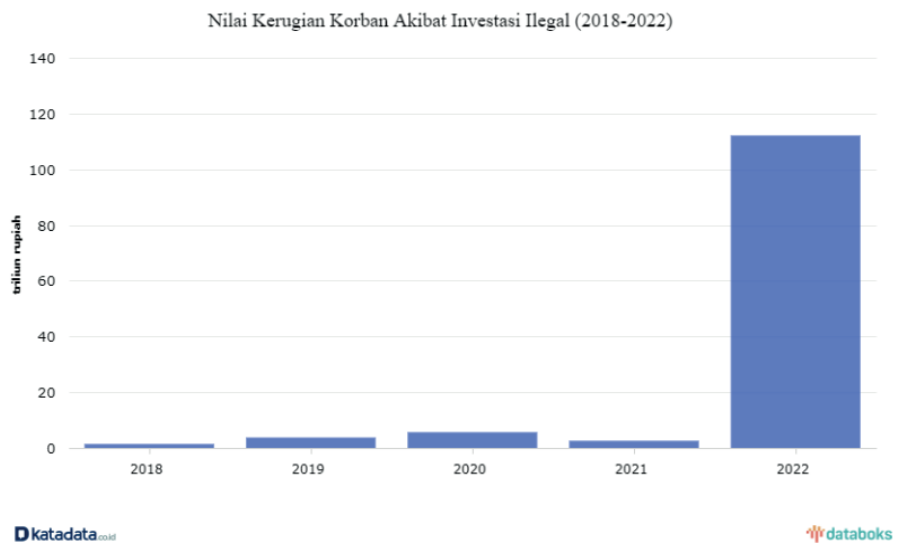
According to the report on economic and investment developments for the second quarter/2022 by the Deputy for Coordinating Commerce and Industry of the Coordinating Ministry for Economic Affairs of the Republic of Indonesia in January - June 2022, investment realization reached Rp—584.6 trillion, or 32 percent higher than the previous year's period. Until the second quarter of 2022, investment realization reached 48.7 percent of the target of IDR 1,200 trillion.[2]

Amid this encouraging development of investment figures, investment activists are now encountering many companies and individuals using technology to conduct illegal business that does not obtain permission from the Financial Services Authority (OJK), usually known as fraudulent investment, fraudulent business, or fraudulent products. The mechanism is that people are offered and persuaded with significant income and income in the shortest possible time (instant) without working hard. The main goal of fraudulent investors is just to collect as many public funds as possible regardless of the losses borne or experienced by the victims. Investors are usually promised benefits when they provide capital to the perpetrators. However, at maturity, investors cannot share profits.[3]

In addition, investors tend to invest or reinvest if the investor gets the return as promised. According to Safir Senduk, the characteristics of illegitimate/illegal investments are offering the potential for fixed income gains every day or every month without working, providing unrealistic offers in the form of percentages, convincing clients that the business is very profitable without informing clients of risks or losses, and crowd/illegal investments often use intermediary applications such as gold selling investment applications. Still, the gold purchased never comes, and there is no notification. The Investment Alert Task Force announced a reference for potential investors to be aware of some of the characteristics of fraudulent investments: "high-return, free-risk, high-incentive, unfair, big-promise & guarantee." Like indirect investment, investors do not need to physically attend because, in general, in some instances, investors want to own a company permanently by considering a particular business.[3]

Indonesia itself, in the 2018-2022 period, according to the Financial Services Authority (OJK), the losses suffered by the public due to illegal investments have exceeded Rp.

126,000,000,000 (One Hundred Twenty-Six Trillion Rupiah). Details of the loss can be seen in the following graph:[4]



Source: databoks

Figure 1:

One fraudulent investment that has been rampant lately is investing in Ponzi schemes. Ponzi schemes are illegal investment modes to take advantage of by exploiting the victims' ignorance. Ponzi schemes are also known as pyramid schemes because newly joined members will become tiers like a pyramid. Usually, Ponzi schemes are also synonymous with forming chain artisan or under the guise of multi-level marketing (MLM).[5]

On the other hand, Ponzi schemes do not require members to find new members. The company searches for members. Even though members don't need to look for new members, they still earn money from newly registered people. This method is usually used in the form of cooperatives, shady banks, or investment schemes. According to the Financial Services Authority (OJK), Ponzi schemes are fake investment modes that provide investors with profits from their own money or those paid by subsequent investors so that the money earned does not come from the profits obtained from the individuals or organizations that run this operation. According to observations by the Financial Transaction Reports and Analysis Center (PPATK), wealthy people, often called Crazy Rich, commit money laundering crimes. The money laundering was allegedly carried out using a Ponzi scheme. Money laundering is carried out by buying luxury assets in vehicles, houses, jewelry, and other assets that must be reported by goods and service providers (PBJ) as writing parties to PPATK, but in practice. They are not

reported to PPATK. Those who are often nicknamed 'crazy rich' should be suspected of committing the crime of money laundering originating from fraudulent investments using the Ponzi scheme.”[5]

The method used in Ponzi schemes is to rely on the flow of funds from new investors to pay off old investors so that, in a short time, they can get enormous profits. These profits require an inflow of funds from new investors to continue the Ponzi scheme. However, this investment can slowly collapse if the flow of incoming funds slows down due to the absence of new investors. Fraudulent investment with Ponzi schemes has been typical in Indonesia since the 1990s. Some examples of investment offer with Ponzi schemes in Indonesia include PT. Qurnia Subur Alam Raya (QSAR), Golden Traders Indonesia (GTI) Syariah, Virgin Gold Mining Corporation (VGMC).[5]

In 2023, a Ponzi scheme is haunting the community; one of the Jombingo applications is an e-commerce application that claims to sell goods at low prices. Initially, Jombingo offered cheap shopping for Rp. 10,000 (Ten Thousand Rupiah). But the way to buy it is by inviting other people who still need to download the app. For example, to make a purchase, a prospective buyer will become the head of a buying group or become a member of a purchasing group that has been formed. Later, only one person in the group can own the goods with a lottery system. While the rest of the group members who did not receive the goods will get their capital back along with money called cashback starting from IDR 10,000 (Ten Thousand Rupiah). Meanwhile, those selected to get the goods can choose to buy the goods at a predetermined price or sell the goods to Jombingo, according to the purchase price plus 5 percent. Later, the members admitted they could not withdraw their money from the application.[6]

Apart from the Jombingo Application, several other investment applications include Accel Group, Robot Trading Auto Trade Gold, First Travel, Dream for Freedom (D4F), MeMiles, Sunmod Alkes, and many more.[6]

From the introduction above, the purpose of this writing is to discover how criminal liability is in investing with Ponzi schemes in Indonesia and the protection efforts that can be provided for victims.

2. METHODOLOGY/ MATERIALS

This is normative legal research based on a norm vacuum with a statute and conceptual approach. The technique of collecting legal materials used in this research is library research and qualitative descriptive analysis. The principal/primary legal materials used

are statutory regulations. Secondary legal materials are also used to assist the investigation, including supporting literature such as books, research reports, journals, and the like.

3. RESULTS AND DISCUSSIONS

3.1. Criminal liability in investing with Ponzi schemes in Indonesia

Criminal responsibility in criminal law is a central concept known as the teaching of error. Mistakes in the narrow sense can be intentional (*opzet*) or negligent (*culpa*). In Latin, this error teaching is known as “*mens rea*”. The doctrine of *mens rea* is based on an act that does not result in a person being guilty unless the person’s thoughts are evil [7]. Criminal responsibility assesses whether a suspect/defendant can be held accountable or a criminal act occurred [8].

A suspect/defendant can be held responsible for a criminal act committed and can be punished if he has made a mistake; that is, if he commits a criminal act from a societal perspective, he can be blamed for it because he is deemed to have done something else if he had not done so [9]. Thus, criminal responsibility is a person’s responsibility for the criminal acts he commits. So, what the suspect/convict is responsible for is the crime he committed. The occurrence of criminal liability because the suspect/convict has committed a criminal act. Criminal liability is a mechanism built by criminal law to react to violations of an “agreement to refuse” a certain act [10].

A person can be punished if that person has committed an act that is against the law, has made a mistake, and is capable of taking responsibility. Guilt is the existence of a certain psychological condition in the person who commits a criminal act, and the relationship between this condition and the act committed is such that the person can be blamed for committing the act [11]. Based on the above, for there to be an error, two things must be considered in addition to committing a criminal act, namely first, the existence of a certain psychological (inner) state, and second, the existence of a certain relationship between that inner state and the action carried out which causes reproach [11].

In criminal responsibility, it must first be that the actions carried out by a person have been regulated as criminal acts, which is also explained in the principle of legality in Article 1 of the Criminal Code (KUHP). The principle of *noela poena sine praevia lege* (legality principle) is very important in material criminal law. The principle of legality in

material criminal law is formulated as *nullum delictum nulla poena sine praevia lege poenali* (there is no criminal act without previous criminal law) [12].

Investors are subject to statutory regulations. In Indonesia itself, this is related to law enforcement against fraudulent investments with Ponzi schemes in Indonesia. In this case, the perpetrator of this act can be charged under several regulations in force in Indonesia, which are then related to fraudulent investments using Ponzi schemes, one of which can be charged using Article 378 of the Criminal Code, which reads: "Anyone with the intention of benefiting himself or another person unlawfully, by using a false name or false dignity, by deception or a series of lies, inducing another person to hand over something to him, or to give a debt or write off a receivable, is punishable for fraud by a maximum imprisonment of four years".

Article 378 of the Criminal Code essentially discusses fraud with a maximum penalty of 4 (four) years in prison. 20 In this case, according to Moeljatno, the criminal regulations contained in this article are about acts of bedrock or fraud. Of course, it can be clearly seen that the prohibition against fraudulent investment in Indonesia is prohibited in this article, which is a positive law in Indonesia. The act of fraudulent investment fulfills the elements of the article, one of which is that the perpetrators of fraudulent investment intend to benefit themselves by violating the law, where it is clear that the investment is not officially registered in legal regulations in Indonesia.

In addition, the ban on Ponzi schemes is also prohibited, as stipulated in Article 105 of Law Number 7 of 2014 concerning Trade. It stipulates that "Distribution Business Actors who apply a pyramid scheme system in distributing Goods as referred to in Article 9 shall be subject to imprisonment for a maximum of 10 (ten) years and/or a maximum fine of Rp. 10,000,000,000.00 (ten billion rupiahs)". In this case, what is meant by a pyramid scheme is the term or name of a business activity that is not the result of goods sales activities. The business activity takes advantage of opportunities for the participation of business partners to obtain rewards or income, especially from the participation fees of other people who join later or after joining the business partners.

Fraudulent investors with Ponzi schemes can also be punished using Article 3 of Law Number 8 of 2010 concerning the Prevention and Eradication of Money Laundering Crimes, hereinafter referred to as the (TPPU Law). Which actions of the perpetrator, if you look at the meaning contained in the sound of the article, where the perpetrator has placed investment money from the victim, which should be suspected of being the result of a criminal act of fraud which then aims to carry out money laundering, can be subject to imprisonment for a maximum of 20 (twenty) years and may be subject to a maximum fine of Rp. 10,000,000,000.00 (ten billion rupiah). Because the elements of

the act committed by fraudulent investment actors fulfill the provisions in that article, the perpetrator, in this case, can be punished using that article.

Because the regulations related to fraudulent investments with Ponzi schemes do not yet have specific regulations in Indonesia, Article 103 of Law Number 8 of 1995 concerning Capital Markets, hereinafter referred to as (Capital Market Law) in this case, can also be used to punish fraudulent investors by Ponzi schemes in Indonesia, as mandated in that article and looking at the form of fraudulent investment with Ponzi schemes, of course, they do not have permits, approvals and also registration and this has fulfilled the elements and also the intent of the provisions governing capital market activities in Indonesia . Law enforcement using this legal basis is a repressive effort that can be made against fraudulent investors with Ponzi schemes, which is due to the fact that there is no specific regulation relating to fraudulent Ponzi scheme investments in Indonesia, the legal basis used for these actions can be interpreted based on the type activities and actions carried out by the perpetrator to harm the victim [13].

3.2. Efforts to Legally Protect Victims of Investment Using Ponzi Schemes In Indonesia

Legal protection is protection given to legal subjects in the form of tools both preventive and repressive, both verbal and written [3]. According to Philipus M. Hadjon, legal protection is divided into preventive legal protection and repressive legal protection [14]. Preventive legal protection aims to prevent a conflict or dispute, which directs government actions to be careful in making decisions based on discretion. Preventive legal protection against the public as investors can be seen in Article 28 of Law Number 21 of 2011 concerning the Financial Services Authority, which reads:

- (a) Providing information and education to the public on the characteristics of the financial services sector, its services and products;
- (b) Requesting a Financial Services Institution to stop its activities if the activity has the potential to harm the community; and
- (c) Other actions deemed necessary following the provisions of laws and regulations in the financial services sector.

In Article 28 of the OJK Law, in terms of being representative, the OJK, as the government in providing preventive legal protection is to provide information to the public regarding the characteristics of the sector contained in financial services, services, and products, and can also ask the financial services institution if harm the community in

carrying out its activities, and take other actions deemed necessary. Therefore, in this case, it is a preventive effort that investors can make before choosing a financial service institution to invest in.

Meanwhile, repressive legal protection aims to resolve the occurrence of a conflict or dispute, including handling it in the judiciary [14]. Repressive legal protection for victims of fraudulent investments who use Ponzi schemes can be seen in Article 378 of the Criminal Code.

In addition to Article 378 of the Criminal Code, if a Ponzi scheme is carried out using electronic media, it can also use repressive legal protection against victims of bogus Ponzi scheme investments, perpetrators can be charged with several favorable laws that apply in Indonesia, one of which is by using Law Number 19 of 2016 Regarding Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions (UU ITE) in Article 28 paragraph (1) of the ITE Law, it can be used to punish perpetrators of these fraudulent investments. Article 28 Paragraph (1) reads, "Everyone who intentionally and without rights spreads false and misleading news that results in consumer losses in electronic transactions shall be imprisoned for a maximum of 6 years and/or a fine of a maximum of Rp. 1,000,000,000,000 (one billion rupiah).

In addition, Article 3 of the Money Laundering Law can be used because the activities carried out, in this case, are under the guise of fraudulent investment, which, in this case, using the article can touch upon elements of how the perpetrator takes advantage of the victim's profits. And the last repressive effort considering that the fraudulent Ponzi scheme investment in the 'alumina' application is not officially registered and has permission, the perpetrator, in this case, can be subject to Article 103 of the Capital Market Law, which in that article requires that every party carrying out activities in the capital market must have permission [15].

4. CONCLUSION AND RECOMMENDATION

First, those who invest in Ponzi schemes in Indonesia can be held criminally liable or charged under Article 378 of the Criminal Code, Article 105 of the Trade Law, Article 3 of the TPPU Law, and Article 103 of the Capital Markets Law. No one has regulated Ponzi schemes, but several of the articles above can be used, especially for criminal charges, as a form of criminal responsibility for the perpetrator. Second, legal protection efforts for victims of Ponzi schemes in Indonesia can be provided preventively and repressively. Preventively from the OJK as an institution that supervises investment in Indonesia, especially in Article 28 of the OJK Law, which in this representative case is that the

OJK as the government provides preventive legal protection by providing information to the public regarding the characteristics of the sectors contained in financial services, services and also its products, and can also ask the financial services institution if it is detrimental to the public in carrying out its activities, and take other actions deemed necessary. Therefore, in this case, it is a preventive effort that investors can make before choosing a financial service institution to invest in. Meanwhile, expressly, by reporting and being criminally charged under Article 378 of the Criminal Code, if done with the help of electronic media in Article 28 paragraph (1) of the ITE Law and Article 3 of the TPPU Law with the threat of imprisonment or a fine.

As a suggestion, it is hoped that the government will immediately pay attention to fraudulent investment actions. It is expected that there will be changes or revisions to the law, namely adding Ponzi scheme regulations to the law governing investment so that perpetrators of fraudulent investment who use Ponzi schemes are given appropriate sanctions. It is also hoped that there will be guidance, counseling, and education regarding investment from the government or authorized institutions so that people are not easily deceived and can be more careful in investing activities.

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