

## Legal Status of Venture Capital Fund Joint Investment Contract

Michael Widyaputra<sup>1</sup>

<sup>1</sup>Faculty of Law, Doctor of Law Program, Universitas Pelita Harapan,  
E-Mail: [michaelwidyap@gmail.com](mailto:michaelwidyap@gmail.com)

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#### Corresponding Author:

Michael Widyaputra, e-mail :  
[michaelwidyap@gmail.com](mailto:michaelwidyap@gmail.com)

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### Abstract

Indonesian Venture capital companies can manage a Venture Fund (Dana Ventura) in the form of a Joint Investment Contract (Kontrak Investasi Bersama). Venture Fund is a financial instrument to collect and manage investor funds to be used for venture capital business activities. This Venture Fund is managed together with the Custodian Bank (Bank Kustodian) whose task is to store and administer the collected funds. The concept of a Venture Fund Joint Investment Contract is similar to that of a Limited Participation Mutual Funds Collective Investment Contract (Reksa Dana Berbentuk Kontrak Investasi Kolektif Penyertaan Terbatas) which also collects and manage funds together with Custodian Bank, then to invest one of which equity securities. However, Venture Fund has not been optimally exploited in Indonesia due to unclear legal status of the fund unlike the Limited Participation Mutual Funds. The issue lies on whether the fund can act in any transactions on its own. This different with Limited Participation Mutual Funds where the regulation is clear that Mutual Funds cannot act on its own. The purpose of this study is to determine the legal status of Venture Fund by comparing it with Limited Participation Mutual Funds. The research method used is a normative legal research method. The results of this study indicate that the Venture Fund is not a legal entity. Furthermore, in conducting venture capital business activities, Venture Fund should be represented by Custodian Bank, as is the case with Limited Participation Mutual Funds.

## 1. Introduction

The first true venture capital firm was the American Research and Development established in 1946 by a small group consist of MIT President Karl Compton, Harvard Business School Professor General Georges F. Dorior and local business leaders. They that made high-risk investments in emerging companies that were based on technology developed for World War II. Activity in the venture industry increase dramatically in late 1970s and in the early 1980s.<sup>1</sup>

<sup>1</sup> Paul Gompers and Josh Lerner, "The Venture Capital Revolution," *Journal of Economic Perspectives* 15, no. 2 (2001): 145-68, <https://doi.org/10.1257/jep.15.2.145>. p. 146.

In Indonesia, venture capital was first established by the establishment of PT Bahana Pembinaan Usaha Indonesia through Government Regulation No. 18 of 1973, which is a company that aims to grow small and medium enterprises through equity participation. Until 1998, venture capital business was controlled by the government but then under the Presidential Decree Number 61 of 1988 regarding Financing Institutions and Minister of Finance Decree Number 1251/KMK.03/1998 regarding Financial Institutions (MOF Decree 1251/1998), both dated December 20, 1998, the government opens venture capital business for public investors. Financing companies since then was further expanded to include venture capital, securities trading, factoring, credit card business, and consumer financing.<sup>2</sup>

Venture capital financing is a significant form of financial intermediation since there is no strict regulatory definition of the venture capital, unlike commercial banking or insurance, but generally speaking venture capital firm provide privately held "entrepreneurial" firms with equity, debt, or hybrid forms of financing.<sup>3</sup> Investments made by the venture capital company are to companies perceived to have a long-term growth and potential return, in various business phase from seed up to the expansion phase along with the involvement in the management of the company.<sup>4</sup>

Further, venture capital investments usually made through several venture funds to invest in early-stage companies on behalf of the investors. In general, the venture funds consist of two main components namely General Partner (GP) and Limited Partner (LP). LPs are the fund investors in the venture funds, while GPs consists of a partner(s), principal(s), associate(s) and an analyst team. Mainly traditional venture capital company play a significant role in funding early-stage impactful business, taking risk in business models that still need to be proven.<sup>5</sup>

Venture capital business is supervised by the Indonesian Financial Services Authority (Otoritas Jasa Keuangan, OJK). The OJK issued 3 (three) regulations to organize the industry, namely OJK Regulation No. 34/POJK.05/2015 of 2015 regarding Business and Institutional Licensing of Venture Capital Companies (OJKR 34/2015), OJK Regulation No. 35/POJK.05/2015 of 2015 regarding Business Operation of Venture Capital Companies (OJKR 35/2015) and OJK Regulation No. 36/POJK.05/2015 of 2015 regarding Good Corporate Governance of Venture Capital Companies (OJKR 36/2015).

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<sup>2</sup> Eka Mulia AL Amin and Iza Hanifuddin, "Implementation of Financial Services Authority Regulation No 35/POJK.05/2015 Article 35 by Indonesian Venture Capital Companies in 2015," *Journal of World Economy: Transformations & Transitions* 1, no. 2 (2021), <https://doi.org/https://doi.org/10.52459/jowett1281121>. p. 6.

<sup>3</sup> Raphael Amit, James Brander, and Christoph Zott, "Why Do Venture Capital Firms Exist? Theory and Canadian Evidence," *Journal of Business Venturing* 13, no. 6 (1998): 441-66, [https://doi.org/https://doi.org/10.1016/S0883-9026\(97\)00061-X](https://doi.org/https://doi.org/10.1016/S0883-9026(97)00061-X). p. 442.

<sup>4</sup> Andi Buchari et al., "The Capital Structure of Venture Capital Firms in Indonesia," *Jurnal Keuangan Dan Perbankan* 20, no. 3 (2016): 407-16, <https://doi.org/https://doi.org/10.26905/jkdp.v20i3.267>. p. 408

<sup>5</sup> David Soukhasing, Valencia Dea, and Christie Ruslim, "Social Finance and Social Enterprises: A New Frontier for Development in Indonesia," *Jurnal Perencanaan Pembangunan: The Indonesian Journal of Development Planning* 1, no. 3 (2017): 240-55, <https://doi.org/https://doi.org/10.36574/jpp.v1i3.22>. p. 246.

Previously MOF Decree 1251/1998 simply explain a venture capital business as a financing business industry in the form of capital participation for a certain period of time. However, under OJKR 35/2015 this has expanded into at least 7 (seven) main business activities, namely (i) equity participation, (ii) quasi equity participation, (iii) financing through the purchase of debt securities, (iv) productive financing, (v) fee-based service activities, (vi) other business activities with the approval of OJK, and/or (vii) the management of venture fund.<sup>6</sup>

Although venture capital business has been around since the early 1970s, the concept of venture fund is relatively new in the Indonesian legal framework since its introduction under OJKR 35/2015, the OJKR 34/2015 and OJKR 36/2015 does not regulate venture fund. Moreover, it is also rarely being discussed in the academic world on the concept of venture fund. OJKR 35/2015 stipulates venture fund as a Joint Investment Contract (*Kontrak Investasi Bersama*) made between a venture capital company or sharia venture capital company and a custodian bank, in which the venture capital company or sharia venture capital company is authorized to manage funds from investors that will be used to carry out venture capital business activities. OJK opens the opportunity for individuals or institutions both from within Indonesia or abroad to be an investor and make an investment into a venture fund.

Built upon OJKR 35/2015 it is understood that a venture capital company may only collect and manage investor funds through a venture fund. Further, a venture fund is separated from the venture capital company, whom is the venture fund manager, since a venture fund is established and managed under a joint investment contract not the articles of association of a venture capital company. Indonesia's regulatory approach is different to neighbouring country Singapore and the Cayman Islands. In Singapore, a fund manager may manage investors funds under the Registered Fund Management Company (RFMC) license issued by the Monetary Authority of Singapore, with restrictions only can provide fund management services to no more than 30 (thirty) qualified investors and the total AUM of the fund manager should not exceed SGD250 million. Whereas in the Cayman Islands it has a significantly similar to a RFMC in Singapore under Schedule 3 or 4 of the Securities Investment Business Law.<sup>7</sup> Hence, both Singapore and the Cayman Islands does not separate the venture fund and venture capital company, a venture fund activity may be conducted under the same license.

OJKR 35/2015 regulation decision to separate the venture fund from the venture capital company brings to light the question on what basis the venture fund can act while conducting venture capital business activities since a venture fund is established and managed under a joint investment contract. In Indonesia those who are identified as a subject of law (*subjek hukum*) namely humans (*naturalijke persoon*), legal entity (*rechtspersoon*) which covers (i) association (*perkumpulan*), (ii) limited liability

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<sup>6</sup> Lastuti Abubakar and Tri Handayani, "Venture Capital Regulation Reform: Revitalization of Venture Capital as an Alternatives Financing Mentorship and Partnership Based," *J. Priv. & Com. L.* 3 (2019): 8, <https://doi.org/DOI.10.15294/jg.v16i1.18531>. p. 9.

<sup>7</sup> Lin Lin, "Venture Capital in Singapore: The Way Forward," 2019, <https://doi.org/DOI:10.2139/ssm.1370519>. p. 367.

company (perseroan terbatas), (iii) state corporation (perusahaan negara), (iv) foundation (yayasan), and (v) cooperatives (koperasi).<sup>8</sup> Joint investment contract between the venture fund manager and custodian bank seems to not fall under any of the subject of law categories. If the venture fund is not a subject of law, it is unable to have legal relationship (hubungan hukum). Thus, it may prevent the venture fund to conduct venture capital business activities.

However, as the joint investment contract may seem a new creature being introduced by OJK, this is not the case. Similar concept was introduced earlier by Law No. 8 of 1995 regarding the Capital Market (Law 8/1995) namely the Mutual Fund in the form of Collective Investment Contract (Kontrak Investasi Kolektif), specifically the Limited Participation Mutual Funds Collective Investment Contract (Reksa Dana Berbentuk Kontrak Investasi Kolektif Penyertaan Terbatas) which is regulated under OJK Regulation No. 34/POJK.04/2019 regarding Limited Participation Mutual Funds Collective Investment Contract (OJKR 34/2019). Law 8/1995 provides the ability for a collective investment contract to collect funds from investors to be further invested.

Considering the existence of a similar concept to the joint investment contract, this research will compare the regulatory framework between joint investment contract and collective investment contract with an aim to understand whether a venture fund joint investment contract can be deemed as a subject of law, and should it not be a subject of law who will be the party to act on behalf of the venture fund.

Publication of the results of previous research is different from the research currently being conducted. In regards to the venture capital company, Chairi discussed the legal basis of the presence of venture capital in Indonesia and the roles of a venture capital in micro, small medium enterprises (MSMEs) development.<sup>9</sup> Whereas, MSMEs development has been mandated under several regulation both in the national level and institutions-issued regulations, including under all regulations related to venture capital namely OJKR 34/2015, OJKR 35/2015 and OJKR 36/2015.<sup>10</sup> Further, regarding foreign venture capital companies that conduct business in Indonesia was understood not under the supervision of the OJK.<sup>11</sup> Moreover, any investments made by the

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<sup>8</sup> Dyah Hapsari Prananingrum, "Telaah Terhadap Esensi Subjek Hukum: Manusia Dan Badan Hukum," *Refleksi Hukum: Jurnal Ilmu Hukum* 8, no. 1 (2014): 73-92, <https://doi.org/https://doi.org/10.24246/jrh.2014.v8.i1.p73-92>. p. 86.

<sup>9</sup> Zulfi Chairi, "Legal Aspects of Venture Capital Financing and Its Relation to the Development of Micro, Small and Medium Enterprises (MSMEs) in Indonesia," 2020. p. 1444.

<sup>10</sup> Zulfi Chairi, Afrita Afrita, and Eko Yudhistira, "Venture Capital As An Alternative Funding For Micro Small And Medium Enterprises (UMKM) In Medan," *Jurnal Jurisprudence* 9, no. 2 (2019): 222-41, <https://doi.org/https://doi.org/10.23917/jurisprudence.v9i2.9020>. p. 222.

<sup>11</sup> Anak Agung Sagung Ngurah Indradewi, "Kedudukan Otoritas Jasa Keuangan Pada Perusahaan Modal Ventura Asing," *Jurnal Aktual Justice* 3, no. 2 (2018): 79-96, <https://doi.org/https://doi.org/10.47329/aktualjustice.v3i2.536>. p. 79.

foreign venture capital companies into local Indonesian companies should be deemed as foreign direct investment into the companies.<sup>12</sup>

In relation to the venture fund, Setiady discussed that with the introduction of venture fund is part of the legal reform in the venture capital business, which it is expected to raise funds from professional investors, so that it can provide access to capital for business and especially MSMEs that have an orientation towards product innovation.<sup>13</sup> Further, the development of venture fund in the context of Indonesia's sharia financial industry stores a huge potential growth and brings opportunity for investors to get into ventures funds.<sup>14</sup> Mainly previous research discussed venture fund in relation to its breakthrough for the venture capital business and the development potential of the venture fund.

Built from the explanation above, there has never been a dedicated research and discussion on the legal status of the venture fund. This research is distinct from the other researches that has been done where it will focus on assessing the legal status of venture funds. The urgency of this research is due to the lack of clarity in OJKR 35/2015 regarding the position of venture funds as subject of law and who are the organs or parties that can act in terms of exercising venture capital business activities by the venture fund. Gaining an understanding of the legal status of venture fund will provide legal certainty for the operation of venture fund. This will expand the adoption of venture fund in Indonesia which will directly impact the growth of the venture fund and venture capital industry in Indonesia. In addition, a legal certainty of venture fund will attract more foreign venture capital to set up their business in Indonesia. With the increasing number of foreign venture capital in Indonesia, it has a positive effect on foreign investment in Indonesia, especially for startup companies and MSMEs.

The legal uncertainty regarding the regulation of venture funds is practically felt and reflected in the lack of development of venture fund management in the venture capital industry in Indonesia. In addition, there is an imbalance in the progress of venture fund management when compared to the management of Limited Partnership Mutual Funds. Based on data submitted by OJK as of December 2021, currently the investment made in new venture funds is only 183 billion Rupiah, of the total assets of the Indonesian venture capital industry which currently has reached 21.26 trillion Rupiah or only represents 0.86% of the total asset.<sup>15</sup> This is also in stark contrast to the value of asset management in Limited Partnership Mutual Funds where the total net

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<sup>12</sup> Melly Moraito Trianita Siregar, "Investasi Modal Ventura Asing Kepada Start-Up Company (Perusahaan Rintisan) Di Indonesia," *Jurist-Diction* 4, no. 4 (2021): 1567-82, <https://doi.org/https://doi.org/10.20473/jd.v4i4.28487>. p.1567.

<sup>13</sup> Tri Setiady, "The Legal Reform of Venture Capital Financing Institutions As a Financing Alternative for Micro Small and Medium Enterprises," *Fiat Justisia: Jurnal Ilmu Hukum* 15, no.1 (2021): 13-24, <https://doi.org/https://doi.org/10.25041/fiatjustisia.v15no1.1969>. p. 13.

<sup>14</sup> Abubakar and Handayani, "Venture Capital Regulation Reform: Revitalization of Venture Capital as an Alternatives Financing Mentorship and Partnership Based." p. 12.

<sup>15</sup> Otoritas Jasa Keuangan, "Statistik Lembaga Pembiayaan Periode Desember 2021," n.d.

asset value (NAV) currently is 31.2 trillion Rupiah at the end of 2021.<sup>16</sup> It appears that there is enormous potential that has not been enjoyed by Venture Fund in developing the management of investors' funds and how lagging the utilization of Venture Fund is. Therefore, there must be a solution to the obstacles faced by Venture Funds in order to increase its competitiveness.

## **2. Research Method**

Legal research is a scientific activity based on certain methods, systematics and thoughts that aim to study certain legal phenomena, by analyzing them, and then seeking a solution to the problems that arise in the phenomena in question.<sup>17</sup> This research examines the legal status of Venture Fund by comparing it with Limited Participation Mutual Funds. Comparative research is necessary as Venture Fund and Limited Participation Mutual Funds are similar in nature. The difference between the two is that Venture Funds are financial instruments intended for the venture capital industry, while Limited Participation Mutual Funds are intended for investment companies. The research utilizes normative research or library research carried out with secondary data to answer the problem.<sup>18</sup> Secondary data in the form of primary legal materials, secondary legal materials, and tertiary legal materials; whereas primary legal materials are legal materials that have binding force, such as statutory regulations while secondary and tertiary legal materials are materials that provide instructions and explanations for primary legal materials.<sup>19</sup> Primary legal materials in this research consists of OJKR 35/2015, OJKR 34/2019, and OJK Regulation No. 23/POJK.04/2016 regarding Mutual Funds Collective Investment Contract as amended by OJKR No. 2/POJK04/2020 (OJKR 23/2016).

## **3. Results and Discussion**

### **3.1 Venture Fund Regulation and Management in Indonesia**

Venture Fund is regulated by OJK through OJKR 35/2015, specifically under Chapter VII. This is the first time Venture Fund was introduced and regulated since the first establishment of venture capital business in Indonesia on 1973. Venture Fund was defined as a collective investment contract made between a venture capital company and a custodian bank, whereby the venture capital company should be authorized to manage the funds of investors to be use for conducting venture capital business. Venture capital business activities was elaborated under Article 2 OJKR 35/2015, which includes equity participation, quasi equity participation (convertible note), productive business financing (covering channeling or joint financing), financing by way of the purchase of debt securities issued by start-ups or further development of company, fee-based services, and other business activities with the prior approval of

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<sup>16</sup> Otoritas Jasa Keuangan, "Summary Asset Under Management (AUM) Manajer Investasi 28 April 2022," n.d.

<sup>17</sup> Soekanto Soejono, "Pengantar Penelitian Hukum," *Universitas Indonesia, Jakarta*, 1986. p. 43.

<sup>18</sup> Soerjono Soekanto and Sri Mamudji, "Metode Penelitian Dan Penulisan Hukum," *Jakarta: Rajawali*, 2015. p. 30.

<sup>19</sup> Soekanto Soejono and Sri Mamudji, "Penelitian Hukum Hukum Normatif Suatu Tinjauan Singkat," *Cetakan Ke-18, Jakarta: PT Raja Grafindo Persada*, 2018. p. 13-14.

OJK. It is strictly regulated that venture capital company may only distribute the Venture Fund to companies who are not listed in the stock exchange and the placement of funds is temporary. Moreover, for venture capital companies that intends to manage a Venture Fund should have a minimum equity of IDR20,000,000,000.00 (twenty billion Rupiah), for a limited liability company (perseroan terbatas), and enclose several administrative documents for OJK to review among others the draft of the collective investment contract and standard operating procedures relating to the management of fund. What is interesting to note that OJK opens up management opportunities as well for cooperatives (koperasi), limited partnership (perseroan komanditer), and sharia business unit (unit usaha syariah) to manage a Venture Fund with lower threshold of equity as low as ten to five billion Rupiah depending on the form of business entity that will manage.

Further, after OJK issued an approval for the Venture Fund management, Article 44 OJKR 35/2015 requires the collective investment contract to be drawn up in a notarial deed, which is an authentic deed drawn up by or before a public notary.<sup>20</sup> The contract must at least contain the identity, duties and responsibilities of each venture capital company and custodian bank involved; rights of the investors; objectives of investment, investment policies, cost and description of investment risks; settlement of disputes; and termination of the investment contract. In terms of duties, a venture capital company shall have the responsibility in managing the fund. In connection with this management, the venture capital company are required to invest in the Venture Fund of a minimum of ten percent of the total managed funds, whereas the minimum fund in the Venture Fund to be managed by a venture capital company set by OJK is one billion Rupiah. While the custodian bank will be the party providing collective depository and custodian services in relation to the assets of the Venture Fund, calculating the Net Asset Value (NAV), paying costs related to the Venture Fund, and keeping and maintaining records of the investors. Both venture capital company and the custodian bank are prohibited from having affiliation with each other while managing the Venture Fund. Hence, in the management of Venture Fund, an authorized OJK venture capital company acts as the fund manager and the custodian bank provides services in maintaining the assets and investors records of the Venture fund.

OJKR 35/2015 does not further explain who should be the party to act in the event of the Venture Fund conducting Venture Capital Business. The question remains on whether the Venture Fund itself is able to act on its own, or should it be represented by an authorized venture capital company and/or the custodian bank.

### **3.2 Overview on Limited Participation Mutual Funds Regulation**

Limited Participation Mutual Funds Collective Investment Contract is regulated under OJKR 34/2019, yet OJKR 23/2016 provides the general rule of Mutual Funds Collective Investment Contract. Limited Participation Mutual Funds has been long recognized

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<sup>20</sup> Wibby Yuda Prakoso and Gunarto Gunarto, "Tanggung Jawab Dan Akibat Hukum Dari Akta Notariil Yang Dibuat Oleh Notaris Pengganti Setelah Masa Jabatannya Selesai," *Jurnal Akta* 4, no. 4 (2017): 773–78, <https://doi.org/http://dx.doi.org/10.30659/akta.v4i4.p.773>.

since the issuance of Head of Bapepam-LK Decree No. KEP-43/BL/2008 regarding the same. Limited Participation Mutual Funds is a financial instrument that is used to raise funds from professional investors which are then invested by investment managers in a portfolio of securities. Securities can be in the form of shares, bonds, acknowledgments of debt, commercial securities, proof of debt, units of participation in collective investment contracts, and any securities derivatives. Equity securities investments made by Limited Participation Mutual Funds may only be made on private companies and should immediately sell such equity participation when the company goes public, within a certain period of time and/or conditions. Private companies that the Limited Participation seeks to invest are real sector companies which among others are companies that engaged in the field of production of goods and/or services, investment in the context of increasing working capital, start-up companies for creative economy industry and/or technology industry.

Limited Participation Mutual Funds is made under a collective investment contract which regulates the relationship of investment manager and custodian bank, where investment manager has the authority to manage the portfolios of collective investment and the custodian bank has the role on carrying out collective custody. The investment manager is prohibited to have an affiliated affair with the custodian bank. Aside from providing collective custody and custodian services in relation to the assets of the Mutual Fund, OJKR 23/2016 also specifically requires the custodian bank to register or record the assets of the Mutual Fund under the name of the custodian bank for the benefit of the investors or also known as participating unit holders and take necessary actions related to the registration or recording of said assets. The collective investment contract should also be made in a notarial deed by a notary registered in OJK. Although, the contract is made before a notary and there are assets jointly being managed by the investment manager and custodian bank, Limited Participation Mutual Funds is not a legal entity.<sup>21</sup> Limited Participation Mutual Funds is more of a special private partnership (*persekutuan perdata*), where in a general partnership the establishment is based on an agreement between the partners and the management is carried out by the partners, while the Limited Participation Mutual Funds is established based on an agreement between the investment manager and the custodian bank, whilst the management of the fund is carried out by the investment manager, the custodian bank as the collective depositor, the investors only as silent partners.<sup>22</sup> Moreover, Private partnership is not a legal entity; only limited liability company, cooperative, and foundation is acknowledged as a legal entity.<sup>23</sup>

The context in which the Mutual Fund is not a legal entity can be seen from Article 18 of Law No. 8 of 1995 regarding the Capital Market, as partially revoked by

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<sup>21</sup> Yosephus Mainake, "Aspek Hukum Reksa Dana Kontrak Investasi Kolektif Sebagai Trusts (Legal Aspects Of Mutual Funds In The Form Of Collective Investment Contracts As Trusts)," *Law Review* 20, no. 2 (2020): 246–69, <https://doi.org/10.19166/lr.v20i2.2757>. p. 246.

<sup>22</sup> Gunawan Widjaja and Almira Prajna Ramaniya, "Seri Pengetahuan Pasar Modal: Reksa Dana Dan Peran Serta Tanggung Jawab Manajer Investasi Dalam Pasar Modal," *Kencana: Prenada Media Group, Jakarta*, 2006. p. 73.

<sup>23</sup> Y Sogar Simamora, "Karakteristik, Pengelolaan Dan Pemeriksaan Badan Hukum Yayasan Di Indonesia," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 1, no. 2 (2012): 175–86, <https://doi.org/http://dx.doi.org/10.33331/rechtsvinding.v1i2.95>. p. 176.



Government Regulation in Lieu of Law No. 1 of 2017 regarding Access to Financial Information for Tax Purposes (Law 8/1995). Law 8/1995 differentiates Mutual Fund in the form of limited liability company and collective investment contract, which means the contract is not a legal entity. In addition, Law No. 7 of 1983 regarding Income Tax, as lastly amended by Law No. 11 of 2020 regarding Job Creation, categorize collective investment contract as other forms of business entity, not a legal entity. Furthermore, since collective investment contract is not a legal entity, OJKR 23/2016 gave the authority to the custodian bank to act on behalf of the Mutual Fund, whereas a custodian bank is a legal entity based on Article 1 paragraph 3 OJKR No. 27/POJK.04/2019 regarding Approval for Commercial Banks as Custodian Banks and Article 1 paragraph 2 OJKR No. 12/POJK.03/2021 regarding Commercial Banks.

Nevertheless, although the custodian bank that acts on behalf of the Limited Participation Mutual Fund, the investment manager is still liable for any loss incurred by the investors if it violates the obligations under the contract or relevant law provisions, since the investment manager are the party who manages the fund. The investment manager would not be liable in the event business activities of the fund was carried out in accordance with procedures, bureaucracy and the provisions of existing laws and regulations.<sup>24</sup>

### 3.3 Comparison of Venture Fund and Limited Participation Mutual Funds

#### 3.3.1 Theory on Comparative Law

Comparative law has long been used and only developed at the end of the 20th century. DR. Soedjono explained that comparative law is a legal study method that studies the differences in legal systems between one country and another, or compares the positive legal systems of one nation with another.<sup>25</sup> However, this comparison can also be done within one country only.<sup>26</sup> This is also in line with the opinion conveyed by Rudolf D. Schlesinger who explains comparative law as a method of investigation with the aim of obtaining more in-depth knowledge of certain legal materials.<sup>27</sup> Furthermore, Prof. H.R. Sardjono and Ny. Hj. Frieda Husni Hasbullah explained that the essence of comparative law is:<sup>28</sup>

1. examine whether or not there are similarities and differences
2. investigate the causes behind the similarities and/or differences

If the element concerning similarity concerns that the similarity of a particular legal institution, then the similarity of nature points towards what is the nature of the legal

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<sup>24</sup> Ferdian Kowanda and Suherman Suherman, "Perlindungan Hukum Investor Reksadana Terhadap Manajer Investasi Gagal Bayar Dalam Kontrak Investasi Kolektif," *JUSTITIA: Jurnal Ilmu Hukum Dan Humaniora* 8, no. 5 (2021): 1057-66, <https://doi.org/http://dx.doi.org/10.31604/justitia.v8i5.1057-1066>. p. 1057.

<sup>25</sup> Soedjono Dirdjosisworo, "Pengantar Ilmu Hukum," 2007. p. 59.

<sup>26</sup> Satjipto Rahardjo, *Ilmu Hukum* (Citra Aditya Bakti, 2006). p. 354.

<sup>27</sup> Dirdjosisworo, "Pengantar Ilmu Hukum." p. 60.

<sup>28</sup> R Sardjono and Frieda Husni Hasbullah, *Bunga Rampai Perbandingan Hukum Perdata* (Ind-Hill, 2003). p. 9.

institution. For example, according to *Burgerlijk Wetboek*, the eigendom rights institution (*lembaga hak eigendom*) has the same characteristics as the customary law version of the property rights institution (*hak milik versi hukum adat*). There are several considerations in carrying out the process of comparing laws, namely:

1. Whether a particular legal issue would be useful for comparison.
2. From which sources can we obtain legal materials to be compared, both domestic and foreign materials.
3. What value can be given to the legal materials being compared.

### **3.3.2 Legal Framework of Venture Fund and Limited Participation Mutual Funds**

Based on the explanation provided on each Venture Fund and Limited Participation Mutual Funds, in nature both financial instrument has similarities. These similarities can be seen in several aspects of the funds. In the aspect of purpose of formation, Venture Fund and Limited Participation Mutual Funds are set up to do investments either by way of equity participation or shares ownership, convertible note or bond and acknowledgement and proof of debts in the form of channelling and joint-financing. In the aspect of prospective investee, both Venture Fund and Limited Participation Mutual Funds only invest in companies that has not been listed in stock exchange or companies that have not yet gone public. These funds only focus on investments in private corporations. In the aspect of purpose of investment, the Venture Fund and Limited Participation Mutual Funds aims to provide investments in private companies that focuses on the real sector among others start-up companies and to increase working capital for further development of a company. In the aspect length of investment, the funds only invest in companies temporarily and should exit the company when the investee becomes public or listed in a stock exchange.

Further, in the aspect of fund form, both funds is a contract or agreement in the form of notarial deed that needs to be drawn up by or before a registered notary public, specifically for Limited Participation Mutual Funds it should a notary public registered in OJK. In the aspect of fund management, Venture Fund and Limited Participation Mutual Funds have a manager that administer the operations of the fund. Wherein Venture Fund, an authorized venture capital company acts as the venture fund manager, while in the Limited Participation Mutual Funds it is the Investment Manager that acts as the fund manager. Similarities could also be seen in the aspect of the role custodian bank, where in Venture Fund and Limited Participation Mutual Funds, the custodian bank provides collective depository and custodian services in relation to the assets of the fund. In the aspect of custodian bank and fund manager relationship, both funds prohibit any affiliated relationship between the fund manager and custodian bank. In the aspect of investor's ownership, the investors in a Limited Participation Mutual Funds ownership are measured in a Participation Unit, which the same thing was applied by the custodian bank to Venture Fund's investor where their ownership uses the unit of measurement of Participation Unit. In the aspect of governing authority, both funds are regulated by OJK, but under different department. The Venture Fund is supervised by the Non-Bank Financial Industry Department since venture capital companies is managed by department. While the Limited Participation

Mutual Funds is supervised by the Capital Market Department since under Article 25 OJKR 34/2019 such fund is subject to the provisions of existing laws and regulations in the capital market sector relating to Mutual Fund Collective Investment Contract.

The similarities of Venture Fund and Limited Participation Mutual Fund explained above can be summarized into the following table:

**Table 1: Similiarities Between Venture Fund and Limited Participation Mutual Fund**

No.	Indicator	Venture Fund Joint Investment Contract	Limited Participation Mutual Funds Collective Investment Contract
1	Purpose of Formation	<ol style="list-style-type: none"> <li>1. Equity participation;</li> <li>2. Quasi equity participation (convertible note);</li> <li>3. Productive business financing (covering channeling or joint financing);</li> <li>4. Financing by way of the purchase of debt securities issued by start-ups or further development of company;</li> <li>5. Fee-based services; and</li> <li>6. Other business activities with the prior approval of OJK.</li> </ol>	<ol style="list-style-type: none"> <li>1. Shares;</li> <li>2. Bonds;</li> <li>3. Acknowledgments of debt;</li> <li>4. Commercial securities, proof of debt;</li> <li>5. Units of participation in collective investment contracts; and</li> <li>6. Any securities derivatives.</li> </ol>
2	Prospective Investee	companies not listed in the stock exchange.	private companies.
3	Purpose of Investment	start-ups or further development of company.	companies that engaged in the field of production of goods and/or services, investment in the context of increasing working capital, start-up companies for creative economy industry and/or technology industry.
4	Length of Investment	Temporary.	Should exit immediately when the company goes public, within a certain period of time and/or conditions.
5	Fund Form	Contract in the form of notarial deed drawn up by or before a public notary.	Contract in the form of notarial deed before a notary public registered in OJK.
6	Fund Management	Authorized venture capital company as the venture fund	Investment Manager to manage collective

		manager to manage funds as best as possible.	investment portfolios for a group of clients.
7	Custodian Bank Role	Collective depository and custodian services in relation to the assets of the Venture Fund. Keep and maintain separate records showing all changes to investor data.	Collective custody and custodian services in relation to the assets of the Mutual Fund for the interest of the participation unit holders.
8	Custodian Bank And Fund Manager Relationship	Prohibits affiliated relationship.	Prohibits affiliated affairs.
9	Investor Ownership	Participation Unit.	Participation Unit.
10	Governing Authority	OJK, Non-Bank Financial Industry Department.	OJK, Capital Market Department.

Derived from the explanation above, it is understood that a Venture Fund Joint Investment Contract is similar in nature to a Limited Participation Mutual Funds Collective Investment Contract. Both are the same financial instrument yet utilized in different business sectors, whereupon a Venture Fund is solely used for venture capital companies and a Limited Participation Mutual Funds used by investment management companies.

### **3.4 Legal Status of Venture Fund: Reflection on Limited Participation Mutual Funds**

It is noted earlier that OJKR 35/2015 does not explain who will be the party to act in the event of the Venture Fund conducting Venture Capital Business. While in the Limited Participation Mutual Fund it was discovered that the fund is not a legal entity and the regulation stated that the custodian bank is the party having authority to act on behalf of the fund for the benefit of the investors. The legal status question remains for Venture Fund on whom is able to act on behalf of the fund. Whether the Venture Fund itself is able to act on its own, or should the fund be represented by an authorized venture capital company and/or the custodian bank. Aware that both Venture Fund and Limited Participation Mutual Fund are in principle and in nature similar to each other, it is relevant to assess the legal status of venture fund by comparing it to Limited Participation Mutual Funds.

Venture Fund and Limited Participation Mutual Funds are a contract between the fund manager and the custodian bank to manage the collected funds. Since it is a contract, it is not a legal entity. Venture Fund is more of a private partnership where the Venture Fund is established based on an agreement between the investment manager and the custodian bank, whilst the management of the fund is carried out by the investment manager and the custodian bank as the collective depositor. Therefore, a Venture Fund cannot act on its own when conducting Venture Capital Business. It should be represented by another party who is capable. Thus, the question moves to which party that is able to act on behalf of the Venture Fund.

In reflection to the Limited Participation Mutual Funds, the fund was represented by the custodian bank not by the investment manager. Raison d'être of this goes back to the definition of investment collective contract:

*“a contract between the investment manager and the custodian bank that binds the holder of the participation unit in which the investment manager is authorized to manage the collective investment portfolio and the custodian bank is authorized to carry out collective custody.”* (Article 1 paragraph 3 OJKR 34/2019)

Since the custodian bank is the party that binds the holder of the participation unit it acts for the interest of the participation unit holders. In contrast, the investment manager's role is to manage collective investment portfolios for a group of clients. However, this is not the case in Venture Fund. OJKR 35/2015 does not elaborate the definition of joint investment contract. Nevertheless, despite the absence in OJKR 35/2015, observation on the roles of custodian bank and fund manager in a Limited Participation Mutual Funds and Venture Fund is sufficient to determine whether the role of custodian banks is the same in both funds. Derived from the previous discussion on similarities between venture Fund and limited participation mutual fund it has been understood that custodian banks and fund manager have the same role. Venture Fund custodian banks to keep and maintain separate records showing all changes to investor data and venture capital company as the venture fund manager has the duty to manage funds as best as possible.

Built upon the above, it is more suitable and better for a custodian bank to act on behalf of the investor participation unit holder of Venture Fund in conducting venture capital business activities, rather than the venture capital company whom is the venture fund manager. This representation is necessary since a Venture Fund is not a legal entity that can act on its own.

#### **4. Conclusion**

It can be understood based on the comparative research given, that by nature both venture capital fund joint investment contract and limited participation mutual funds collective investment contract are the same in many aspects. By reflecting on the management of collective investment contract, venture fund is found to be not a legal entity and since it cannot act on its own it needs another party to act on its behalf in order for the venture fund to exercise venture capital business activities. It is best advised for the custodian bank to act on behalf of the venture fund rather than the venture capital company who acts as the venture fund manager. This is based on the reasoning that the custodian bank acts on managing the assets of the fund and the investors whom holds participation unit in the venture fund. Derived from this, OJK regulators should consider to add to the provisions in the current venture fund rules governing who can act for and on behalf of a venture fund note from the above discussion that a venture fund is not a legal entity.

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