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LAW ENFORCEMENT INSIDER *TRADING* IN THE INDONESIAN CAPITAL MARKET

M. SABILUL ALIF [1]*, BUDI SANTOSO [2] and DARMINTO HARTONO [3]

[1, 2, 3] Doctoral Program in Law, Faculty of Law, Diponegoro University, Jl. Prof. Soedarto, SH., Tembalang, Semarang. Corresponding Author Email: *m.sabilulalif@students.undip.ac.id

Abstract

This study aims to analyze law enforcement of *insider trading* in the Indonesian capital market. The research method used is juridical normative with a statutory approach. The results showed that *Insider Trading* is a practice where *corporate insiders* conduct securities transactions (*trading*) using the exclusive information they have (*inside non-public information*) means any information that is important and can affect the price of securities and the information has not been announced to the public. *Insider trading* is one of the most sophisticated crimes in the world which is generally carried out in a very complicated mode and is very difficult to track. Regulations regarding insider trading crimes are regulated in Law Number 8 of 1995 concerning Capital Markets and Law Number 21 of 2011 concerning the Financial Services Authority, expected to resolve alleged Insider Trading cases to the Court and not limited to only providing administrative sanctions to the perpetrators.

Keywords: Law Enforcement, Crime, Criminal Act, Insider Trading, Market, Capital

A. INTRODUCTION

Insider Trading in the Capital Market is a crime that is very difficult to prove, even in developed countries such as the United States. It is not easy to bring the perpetrators of these crimes to criminal justice. *Insider* trading is very dangerous because of its extraordinary impact in a capital market, because this crime can cause the development of the capital market to be hampered and can also indirectly cause the stock exchange to become quiet and not passionate because of the frauds of the people responsible for *insider trading*.[1]

Capital Market Phenomenon One way for economic development in Indonesia is through the capital market which is a source of medium and long-term financing in an effort to mobilize public funds for the development of the business world. Since the activation of the capital market in Indonesia in 1977, the Government has made various efforts to advance the capital market. Through Bapepam as a Government institution that has the authority to make policies in accordance with Article 4 of Law No. 8 of 1995 concerning Capital Market, it is expected to be able to realize a more promising capital market for the progress of the business world.[2]

Quite encouraging developments in the past few years show that the capital market is one of the financial services fields in Indonesia that is quite in demand. Through the potential of today's investors, both individuals and institutions, even more so with the opening of opportunities for foreign investors to participate in the capital market in Indonesia. It is expected that the prospect of the capital market in the future will be more promising. Foreign investors have many choices, besides looking for stocks on well-known exchanges in Asia such as Tokyo Stock Exchange in Japan, Taiwan Stock Exchange in Taiwan, and Seoul Stock Exchange in South Korea, it can also be searched on Southeast Asian exchanges such as Bursa

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Malaysia in Malaysia, The Stock Exchange of Thailand in Thailand, Singapore Exchange Ltd. in Singapore, and of course the Jakarta Stock Exchange in Indonesia.[3]

The key to the success of Bapepam's task includes the extent to which Bapepam products (coaching, regulation and supervision) are able to satisfy its consumers, both internally, namely between work units within Bapepam and externally, namely Capital Market players. In an effort to satisfy its stakeholders, it is important to implement a quality system by Bapepam, which includes quality planning, quality control and quality improvement. The Urgency of Bapepam As a regulator, Bapepam needs to know whether the regulations applied in the Capital Market are based on quality or not, because if not, the chances of irregularities and violations of the law are even greater. Thus, an instrument is needed, namely Quality Legal Audit which is different from the Right to Material Test in the Constitutional Court. The difference is that Quality Legal Audit is interdisciplinary, while Right to Material Test is monodisciplinary.[4]

Of course, the growth of the Capital Market needs to be supported by systems and mechanisms that are based on clear rules of the game. *The Rule of Game* must be reflected in the form of legal provisions that regulate the movements and steps of actors in carrying out Capital Market activities. Every market participant, or those who submit themselves to the legal provisions applicable in the Capital Market, is allowed to create or carry out various investment methods and strategies, is free to create and run various types of businesses, as stated in Government Regulation Number 45 of 1995 concerning the Implementation of Activities in the Capital Market. Freedom in carrying out activities in the Capital Market is certainly necessary and even must be limited by legal signs and procedures determined by laws and other implementing provisions. If there is a violation, the consequences will be faced with legal sanctions according to the type and quality of the violation. The Capital Market Supervisory Agency (Bapepam) based on Law Number 8 of 1995 concerning Capital Market has enormous authority to conduct guidance, regulation and supervision of the capital market industry is expected to be able to carry out its functions in accordance with what is mandated by the Law.[5]

The development of law is closely related to the development that occurs in society, it is in line with the adagium "*Ubi Societas ibi ius*" which means where there is a society there is law. The consequences of rapid activities in the economic field cause existing regulations in the economic sector to be considered no longer able to follow and accommodate legal needs in this field, so new rules are needed in the field of economic law. In practice, activities carried out in the capital market involve various parties who generally aim to seek profit. In such a concept, it does not mean that the parties are free to take advantage of various circumstances for their purposes in the capital market, including committing fraud or violations. Violations of the rules of the game in securities transactions are often caused by weak supervision systems carried out by exchange managers and exchange supervisors, so that if there is a violation of securities transactions either due to manipulation, misleading information or Insider *Trading* (Insider Trading) it is difficult to detect early.[6]

The capital market has the principle of openness as the soul of the capital market which aims to maintain public confidence in the market, create efficient market mechanisms, and also to provide protection to investors. One way to realize the principle of information disclosure in

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the capital market is that public companies assisted by supporting professions must provide the correct prospectus, namely written information in connection with the public offering. Actually, what is traded in the capital market is trust. Public confidence in the value of shares, the correctness of company reports, future profit prospects, government policies that support the capital market to guarantees that the law will be obeyed by the parties. Violation of this principle of information disclosure can result in deviations in the capital market, one of which is the practice of[789] *Insider Trading*.

B. DISCUSSION

1. Insider Trading Crime as a Crime in the Capital Market

Insider Trading is a technical term known only in the capital market. This term refers to the practice where corporate *insiders* conduct securities transactions (*trading*) using exclusive information they have (*inside non-public* information) meaning all information that is important and can affect the price of securities and the information has not been announced to the public.[10] *Insider trading* is one of the most sophisticated crimes in the world which is generally carried out in a very complicated mode and is very difficult to track.

Insider Trading actors are generally also educated or educated people. Even though Article 104 of the UUPM states that the practice of *Insider Trading* is included in criminal crimes. The practice of Insider Trading has a major influence on the development of the Indonesian capital market as a whole, therefore it requires special attention from the government because *Insider Trading* has a bad influence on the investment climate that can harm investors who invest in Indonesia. In these conditions, the law in Indonesia should be present and provide firm protection to investors related to the practice of *Insider Trading*.[11]

Insider trading is a trading of securities carried out by those who are classified as company insiders, which trading is based or motivated by the existence of important insider information and is not yet open to the public, with which trading, the insider trader expects to benefit personally, directly or indirectly, or which is a shortcut advantage (*short swing profit*). In this case, each party must conduct transactions based on fairness, regularity, and openness. This means that someone is prohibited from using information that comes from insiders of a public company or issuer. Likewise, insiders, such as a Director of an Issuer, are prohibited from buying and selling shares on the basis of information he has, even though the material information has not been submitted or known to the public.[12]

Technically, insider trading actors can be divided into two types, namely parties who carry trust directly or indirectly from issuers or public companies or also known as parties who are in a fiduciary position, and parties who receive inside information from the first party (fiduciary position) or known as *Tippee*. Article 95, Article 96, and Article 97 of the Law stipulate that parties who have inside information, and are insiders or classified as insiders, are prohibited from buying or selling securities of the issuer or public company or other companies that conduct transactions with the issuer or public company concerned. In addition, it is also prohibited to influence other parties to make purchases or sales of such securities or provide

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insider information to any party that it reasonably suspects may use such information to make purchases or sales of such securities. It is further stipulated in Article 97 of the Law that any party who deliberately attempts unlawfully to obtain and ultimately obtain inside information is subject to the same prohibition as the provisions of Article 95 and Article 96 of the Law[13].

Insider trading cases can be identified with theft cases. The difference is that if in conventional theft the object is material belonging to someone else, then in insider trading the object of theft still belongs to someone else, but by using information that should be public property, so that the perpetrator gains an advantage. In ordinary theft, the person who suffers losses is the owner of the goods, then in the case of insider trading who suffer so much and widespread losses, ranging from counterparties, to the authority of regulators and the credibility of the capital market.[14]

Capital market crimes, especially related to insider trading, are one of the most sophisticated crimes in the world that are generally carried out with a very complicated modus operandi and are not easy to track. In addition to its sophisticated modus operandi, insider trading actors also generally consist of educated people so it is said that insider trading crimes include white collar crimes or often referred to as *white collar crimes*. Therefore, insider trading crimes tend to be difficult to prove and uncover, plus if law enforcement still uses conventional methods in conducting *law enforcement* on *insider trading* cases. The development of law enforcement, which is an important part in maintaining investor confidence, is strongly influenced by various internal and external factors.

Internal factors include policies taken by the government regarding the capital market, as well as other internal factors such as economic strength, politics, quality and quantity of market participants, the existence of market operational mechanisms and systems, institutional effectiveness and the existence of legal regulations containing law enforcement and legal certainty. Capital markets everywhere, will remain and always take into account political factors as decisive factors.[15]

Meanwhile, external factors that affect the development of the Indonesian capital market and its law enforcement are related to global conditions and influences that affect the dimensions of funds to be invested by fund managers in Indonesia. Insider trading law enforcement is closely related to the authority given by UUPM to Bapepam-LK to supervise the market both preventive in the form or rules, guidelines, guidance, and directions as well as repressively in the form of examinations, investigations, and imposition of sanctions[16].

2. Law Enforcement Against *Insider Trading* Crimes in the Capital Market

Law enforcement is an effort to make the ideas of legal certainty, social benefit, and justice a reality.13 Insider trading law enforcement requires a clear legal basis to make it easier for law enforcement to implement laws and regulations. In Law No. 8 of 1995 concerning Capital Market (UUPM), precisely in Articles 95 to Article 99 has contained provisions that *insider trading* is included in one type of capital market crime, which means that these actions can be subject to sanctions, both administrative sanctions and criminal sanctions.

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Insider Trading can be interpreted as a securities trade carried out by company insiders, where the trade is based or motivated because of an important insider information and has not been published to the public, from which the insider, the insider expects to benefit from shortcuts personally, directly or indirectly. From this understanding, *insider trading* contains several elements, namely:

a. The existence of securities trading transactions;
b. Conducted by *insiders*;
c. The presence of inside information;
d. The information has not been made public;
e. Such trade transactions are motivated by such information; f. Purpose for profit

Insider Trading Crime in Law Number 8 of 1995 concerning Capital Market there are 3 (three) related articles, namely Article 95, Article 96 and Article 97. The explanation of the three articles is as follows:

a. Article 95 of the Law

"Insiders of Issuers or Public Companies who have inside information are prohibited from buying or selling Securities: a. The Issuer or Public Company in question; or b. other companies that transact with the Issuer or Public Company concerned"

The elements contained in Article 95 of the UUPM are as follows:

1) Insider of an Issuer or Public Company here means a legal subject, that is, every insider of the issuer or private person can be responsible and legally competent in accordance with laws and regulations and legal entities.
2) Those who have inside information, what is meant by those who have inside information are commissioners, directors, or employees of the Issuer, the main shareholder of the Issuer who because of their position or function there is the possibility of obtaining all information related to the company.
3) It is prohibited to buy or sell securities, meaning that all forms of transactions that occur between Issuers or Public Companies and other companies are prohibited.
4) The letter a. The Issuer or Public Company in question is a prohibition for insiders to buy or sell the Securities of the Issuer or Public Company concerned based on the consideration that the position of insiders should prioritize the interests of the Issuer, Public Company, or shareholders as a whole including not to use inside information for the benefit of themselves or other parties.
5) Letter b. Other companies that transact with the Issuer or Public Company concerned are in addition to the prohibition listed in letter a, insiders of an Issuer or Public Company who conduct transactions with other companies are also subject to prohibition from transacting on the Securities of the other company, even if the person concerned

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is not an insider of the other company. This is because information about other companies is usually obtained because of its position in the Issuer or Public Company that conducts transactions with these other companies.

b. Article 96 of the Law

"Insiders referred to in Article 95 shall not:

1) Influence other parties to purchase or sell such Securities; or
2) Provide any Party with insider information that it reasonably suspects may use such information to make purchases or sales of Securities".

The elements contained in Article 96 of the UUPM are as follows:

1) Insiders as referred to in Article 95 are prohibited from influencing other parties to purchase and or sell Securities from the Issuer or Public Company concerned, it is intended that although the insider does not provide exclusive information to other parties, there is also a prohibition not to influence the decisions of other parties because this can encourage other parties to buy or sell Securities based on people's information deep.
2) Insiders are prohibited from providing inside information to other Parties who are expected to use such information to purchase and/or sell Securities. Thus, insiders have an obligation to be careful in disseminating information so that the information is not misused by the party receiving the information to make purchases or sales of Securities

c. Article 97 of the Law

1) Any party attempting to unlawfully obtain insider information from an insider and subsequently obtain it is subject to the same prohibition applicable to insiders as referred to in Article 95 and Article 96. That is, they are prohibited from transacting on the Securities concerned, and are prohibited from influencing other parties to make purchases and/or sales of such Securities or provide such insider information to other parties who would reasonably be expected to use such information to purchase and sell Securities. Examples of unlawful acts, among others: a. attempting to obtain inside information by stealing; b. attempt to obtain insider information by persuading insiders; and c. attempt to obtain insider information by violent or threatening means.
2) It states that "Any Party attempting to obtain insider information and subsequently obtain it unlawfully shall not be subject to any prohibition applicable to insiders referred to in Article 95 and Article 96, to the extent that such information is provided by the Issuer or Public Company without restriction." That is, everyone who obtains information unlawfully is not subject to sanctions. For example, if a person who is not an insider requests information from an Issuer or Public Company and then obtains it easily without restriction, that person is not subject to insider restrictions. However, if the provision of insider information is accompanied by a requirement to keep it confidential or other restrictive requirements.

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d. Article 98 of the Law

"Securities Companies that have inside information about the Issuer or Public Company are prohibited from conducting Securities transactions of the Issuer or Public Company, except if:

1) such transactions are carried out not at his own expense, but at the behest of his customers; and
2) The Securities Company does not provide recommendations to its customers regarding the Securities concerned."

The provisions of this Article provide the possibility for Securities Companies to conduct Securities transactions solely for the benefit of their customers because one of the activities of Securities Companies is as a Securities Trader Intermediary who is obliged to serve their customers as well as possible. In carrying out the Securities transaction, the Securities Company does not provide any recommendations to its customers. If the prohibition in this Article is violated, the Securities Company violates the insider provisions as in Article 95 and Article 96.

The elements listed in the above provisions regarding insider trading crimes can be broadly combined with the provisions contained in Article 323 paragraph (1) and paragraph (2) of the Criminal Code regarding the criminal act of leaking secrets / opening secrets, so that law enforcement against *insider trading* crimes Not only administrative sanctions are imposed but also criminal sanctions are needed. Consistent law enforcement is an encouragement for other parties to always comply with the provisions and apply the principle of prudence in conducting their business or in transactions.[17]

The provisions regarding sanctions, one of which is in the form of criminal sanctions, have been specifically regulated in Article 104 of the UUPM that "Any party who violates the provisions as referred to in Article 90, Article 91, Article 92, Article 93, Article 95, Article 96, Article 97 paragraph (1), and Article 98 shall be threatened with a maximum imprisonment of 10 (ten) years and a maximum fine of Rp. 15,000,000,000.00 (fifteen billion rupiah)." Crime reduction using criminal law is part of criminal policy which is considered the most rational legal remedy.[18]

The weakness in the regulation regarding *insider trading* or parties who are prohibited from conducting securities transactions in the UUPM in Indonesia is the non-regulation of tippees who receive insider information passively (do not do business). If it is associated with *misappropriation* theory, then actually the theory can reach all parties, both insiders as referred to in Article 95 of the UUPM, as well as third parties as in Article 97 paragraphs (1) and (2) of the UUPM. Therefore, by referring to the elements of misappropriation theory as outlined above, the element of whether or not there is an attempt from tippee to obtain insider information is no longer taken into account.

The essential factor that determines whether he can be classified as an insider trading actor or not is whether he then conducts securities transactions with the information and benefits from the transaction. Thus, the essence of the theory is the misuse of information, namely insider

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information (which is still confidential) used for personal interests or certain parties who get the information. This material information is actually mandatory to be disclosed to the public as the principle of openness, so that with this information shareholders or potential investors can consider whether to buy or sell shares of the issuer in question, or not to transact securities from the securities issued by the issuer.[19]

With misappropriation theory, the distribution of information on the exchange floor will be more guaranteed, because the main factor of the theory is whether there is information that is misused in securities transactions to make a profit. Misuse of information means that information that should be announced to the public, but has been used for its own interests or even leaked to certain parties with the aim of making a profit. Insider trading law enforcement includes three things, namely administrative, civil, and criminal enforcement. Basically, the UUPM has laid the foundation for law enforcement as a form of protection for any violations of capital market activities, namely administrative sanctions (Article 102 UUPM), criminal sanctions (Articles 103-110 UUPM), claims for civil compensation (Article 111 UUPM). The prohibition of insider trading, basically is so that the information coming out of the company can reach everyone (financiers) evenly first so that no one party benefits, keeping in mind that information on the exchange is an important commodity that makes people decide whether or not to invest. Thus, no one will benefit, especially if the person concerned has access to company management.[20]

In the UUPM it is stated that insider trading as it is known besides being prosecuted civilly or sanctions for unlawful acts, can also be prosecuted criminally, but OJK tends towards compensation or fines / administrative sanctions only, even though it is known that insider trading has a very large influence both on investors and on the development of the capital market as a whole. Therefore, it would be nice if regulators can adjust to the circumstances and conditions that develop in capital market law enforcement.

There are three important things that will be achieved if law enforcement against insider trading cases is implemented, namely:

1) Effective regulation in the field of law, especially law enforcement in general, will result in the development of the capital market in a better direction as well as protection for investors.
2) Effective regulation will establish a cycle of positive linkages between investors and public companies where with a low level of risk will be achieved low operating costs will eventually attract companies to become public companies listed on the capital market.
3) Regulators and agencies that handle law enforcement in the capital market must be able to detect and prevent actions that can harm investors. If investors lose their confidence then the capital market will enter a cycle where the value of shares will fall, public companies that fall into the good category, will exit the capital market in the end capital market activities as a whole will stop

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C. CONCLUSION

Insider Trading is a technical term known only in the capital market. This term refers to the practice where corporate *insiders* conduct securities transactions (*trading*) using exclusive information they have (*inside non-public* information) meaning all information that is important and can affect the price of securities and the information has not been announced to the public. *Insider trading* is one of the most sophisticated crimes in the world which is generally carried out in a very complicated mode and is very difficult to track.

The regulation on insider trading in Law Number 8 of 1995 concerning Capital Market should have provided a legal basis that at least provides a wider and clearer space for law enforcement or stakeholders to take preventive steps as well as take action against violators, this can be reflected in the classification of criminal acts by everyone who conducts insider trading in in the capital market listed in Article 95, Article 96, Article 97, Article 98 and Article 104.

The criminal threat under Article 103 of the UUPM which is a maximum imprisonment of 10 (ten) years and a maximum fine of Rp. 15,000,000,000.00 (fifteen billion rupiah) is not applied in such cases. In fact, if you look at the whole series of actions that have been taken, the application of sanctions that should be given will be much more severe considering this case has been proven before in the *Monetary Authority of Singapore.* It is hoped that with wider investigative authority with the existence of Law Number 21 of 2011 concerning the Financial Services Authority can resolve alleged Insider Trading cases to the Court and not limited to only granting administrative sanctions to the perpetrators. The regulatory and supervisory authority carried out by OJK is expected to make institutions in the Capital Market sector more efficient, healthy and transparent so that the public will no longer be afraid to invest in other financial sectors, including in the Capital Market sector.

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