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Original Research Article

Legal Protection of Investors against Insider Trading Practices Capital Market

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Abstract: This article aims to determine and analyze investor protection against insider trading practices in the Capital Market and the regulation of settlement of insider trading practices by the Financial Services Authority. This article uses normative legal research methods with a statutory and conceptual approach. The results show weaknesses in legal protection and regulations related to resolving problems related to *Insider Trading practices*. In terms of legal protection, it is also not based on empirical facts in the field because no regulations specifically regulate the practice of insider trading. Nothing specifically regulates the settlement of insider trading practices. Also, proving this practice is very difficult, so it cannot provide legal certainty to investors who have experienced capital market violations. There is no firm confirmation from the Financial Services Authority to deter perpetrators of *Insider Trading* by imposing cumulative penalties or sanctions as regulated in the Capital Markets Law. So, *Insider Trading* cases in the Indonesian Capital Market were never resolved through court.

Keywords: Capital Markets, Insider Trading, Legal Protection, Legal Certainty.

1. INTRODUCTION

Capital markets in various parts of the world, especially Indonesia, are essential for developing the country's economy. The capital market is a benchmark for the economy and has a vital role in developing the business sector. These securities are securities traded by companies to investors within the capital market (Afriana & Sujatmiko, 2015). These various types of instruments include shares, bonds, warrants, rights and other effects that occur in the trading mechanism cycle in the capital market. Capital market players also trade in the capital market, including issuers/public companies, investors/financiers, securities underwriters, capital market-supporting institutions and capital market-supporting professions. Trading activities or buying and selling transactions in the capital market are becoming increasingly popular. The general public, especially investors/financiers, needs detailed regulations regarding the capital market (Asriati & Baddu, 2021).

Moreover, to implement capital market activities that can guarantee legal certainty and protection for parties, especially investors, Legislation regarding capital markets was formed, namely in Law Number 8 of 1995 concerning capital markets and the Services Authority Law. Finance (OJK) Number 21 of 2011 (Bonjou & Muryanto, 2019). As explained in Article 1 paragraph (3) of the Capital Market Law Number 8 of 1995, the Capital Market is defined as an activity related to the public offering and trading of securities (securities) of public companies that issue these securities and their issuance in the primary market (primary market). /market where securities are traded). The capital market is where buyers and sellers or issuers meet with investors in companies to increase long-term investment, considering the risks of profit and loss.

In practice, the capital market must be able to apply the principle of openness because this is the core and soul of the capital market itself. After all, the principle of openness is the basis for Capital Market players to carry out market activities honestly and openly between Capital Market players and investors (Investors). (Dimyati, 2014). Openness in securities transactions is all information regarding the state of the business, including the company's financial, legal, management and assets, to the public when investors (investors) wish to invest their capital in a Company. In Article 1 number (25) of Law Number 8 of 1995 concerning Capital Markets, the definition of the principle of openness is formulated, namely: "General guidelines that require public companies and other

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parties subject to this law to inform the public promptly of all information material regarding his business.

The effects can influence the decision of the investor (investor) regarding the securities in question and the price of the securities." Openness regarding the conditions of companies that will issue shares (security offerings) allows potential investors to understand and decide on investment policies (Fadlia & Yunanto, 2015). A disclosure system must be implemented in companies conducting a public offering to convey all information available within the company regarding finances, production management and other matters relating to its business activities. The aim of the principle of openness in the Capital Market, especially in a company that will carry out trading, is to create efficiency and provide a sense of fairness between the parties to the transaction so that, especially for investors, they are safe in investing (Haidar, 2015).

The Capital Market's openness principle also aims to maintain investor confidence. Investors will withdraw their capital from the market if there is investor distrust in the Capital Market and the economy. The principle of information disclosure must be applied to companies that "go public" (the process of transformation from a closed company to a public one) because companies that "go public" carry out the interests of society and are obliged to protect investors. Openness in the Capital Market must continue as long as the company goes public. "The principle of openness is implemented by submitting financial reports periodically, reports regarding new material facts, and events that can affect share prices, which must be reported immediately within two working days (Imaniyati & Wiyanti, 2000).

So, this information has a significant meaning for the community, especially investors, as a consideration for investing (Mahfuzoh & Khanifa, 2019). This term refers to the practice in which insiders (corporate insiders) carry out securities transactions using exclusive information they have that is not yet available to the public or investors with the intention of personal gain. So, with *Insider Trading*, companies can suffer losses, and investors who invest their capital in a company feel cheated (Nandika, 2018). As an economic instrument, the capital market is not immune from abuse by certain parties to enrich themselves through unlawful means, which will be detrimental to companies and investors. Law number 8 of 1995 concerning Capital Markets has prohibited the actions or practices *of Insider Trading*, as regulated in the provisions of Article 95, article 96, article 97 paragraph (1), and Article 98 of the Capital Markets law (Pramita & Hendrayana, 2021).

Article 95 of the Capital Markets Law explains that insiders from issuers or public companies with insider information (IOD) are prohibited from purchasing or selling securities: (b) other companies that carry out securities transactions with issuers or public companies that are concerned. The OJK has the task of supervising financial services in the capital markets, banking, insurance, pension funds, financing institutions and other financial services institutions and changing the functions and tasks previously held by Bapepam-LK (Capital *et al*., Institution Supervisory Agency) to OJK (Financial *et al*.,) (Prabaningtyas, 2018). OJK tries to deal with violations in the capital market by providing civil, administrative, and criminal sanctions to insiders who commit violations in the capital market sector.

However, the OJK has not fully regulated the resolution of Insider Trading practices because proof of *Insider Trading practices* is strict to find, which can be seen from the various obstacles in disclosing Insider Trading, namely differences in legal systems, weak substance/legal regulations, the absence of restrictions regarding when "Insider ' can carry out transactions after material facts are made public (Disclosure), the implementation of legal protection, especially for investors regarding the practice of Insider Trading, is unclear or vague. So, the Financial Services Authority needs help covering alleged insider trading practices that impact investors and weak legal protection for investors if this practice occurs. Based on the description above, this article aims to examine and analyze Investors' legal protection against insider trading practices in the Capital Market and arrangements for settling insider trading practices by the Financial Services Authority.

2. METHODOLOGY

This research applies normative juridical research techniques by analyzing regulations and legal protection for investors in *Insider Trading* in the capital market. The legal sources used include primary legal materials such as Law (UU) Number 8 of 1995 concerning Capital Markets, Laws Number 21 of 2011 concerning the Financial Services Authority, Government Regulation Number 46 of 1995 concerning audit procedures in the Capital Market sector, Law Number 40 of 2007 concerning Limited Liability Companies as well as Secondary and Tertiary legal materials. The approach used in this research is a conceptual approach (conceptual approach) and a legislative approach (statute approach). Legal materials were analyzed using qualitative descriptive analysis techniques, which described relevant aspects and then drew conclusions from the research results.

3. RESULTS AND DISCUSSION

3.1 Investor Legal Protection against *Insider Trading Practices* in the Capital Market

The role of the OJK (Financial *et al*.,) is one solution in law enforcement in the capital markets sector, which is to be a body that protects investors. This institution is the spearhead in implementing the regulatory and supervisory system in the financial sector, especially violations that occur in the Capital Market, namely Insider Trading. Request information and

confirmation from parties suspected of committing or being involved in violations of this law, and it is implementing regulations or other parties if deemed necessary; require parties suspected of committing or being involved in violations of this law or it's implementing regulations to carry out or not carry out specific actions. Establish conditions and/or permit parties suspected of committing or being involved in violations of this law and its implementing regulations to take specific actions necessary to resolve the losses incurred. Regarding this Insider Trading violation, the OJK examined and investigated its implementation.

Civil Servant Investigators are civil servant officials appointed and given the authority to carry out investigations into certain violations within the scope of statutory regulations so that they become the legal basis. Civil Servant Investigators through the Financial Services Authority are assigned to conduct examinations and investigations into *Insider Trading practices.* There are reports, notifications or complaints from parties regarding violations of laws and regulations in the Capital Market sector. Insider trading is buying and selling securities (Securities) such as shares, warrants, bonds, and so on, carried out by insiders using information that has not been shared publicly or is still confidential. As is known and explained by Insider Trading, it still continues and will continue to occur even though there is a law regulating it, namely in Articles 95 – 99 of the Capital Markets Law.

From the analysis that has been taken, one of them is that there is a legal gap because in Article 96 letter (b), insiders, as intended, are prohibited from giving inside information to any party who reasonably suspects that they can use the information in question to make purchases or sales of securities (Puspasari, 2020). In the Indonesian Capital Market, investor protection is the authority and obligation of the Financial Services Authority. Legal protection by the OJK institution is preventive, such as providing information and education and asking Financial Services Institutions (LJK) to stop their activities if they can potentially harm the public. The following action is repressive by the Financial Services Authority, which can be carried out by actions starting from investigations to imposing sanctions on parties who commit criminal acts.

Basically, the Capital Market Law has laid the foundation for law enforcement as a form of investor protection for all violations and crimes occurring in the Capital Market (Putralie *et al*., 2011). The absence of regulations that provide legal protection when losses occur to public investors due to Insider Trading practices means that public investors often need clarification about what legal measures they need to take to obtain justice for the immaterial losses they experience. The duties and authority of the Financial Services Authority must provide legal protection to investors for all forms of violations in the Capital Market, especially Insider Trading practices.

The Financial Services Authority provides two types of protection: preventive protection and repressive protection. These two types of legal protection are of the essence and need to be provided and implemented by all government institutions to maintain and enforce legal protection fairly. One of the legal protections currently being sought and carried out by the Financial Services Authority is by issuing Financial Services Authority Regulation (POJK) Number 14/POJK. 04/2022 concerning submitting Periodic Financial Reports for Issuers or Public Companies. The Financial Services Authority, in providing repressive legal protection, also provides an Alternative Financial Services Sector Dispute Resolution Institution (LAPS SJK), which is regulated in Law Number 4 of 2023 concerning the Development and Strengthening of the Financial Sector. However, this legal protection is not implemented correctly, so in practice, what happens in the Capital Market with Insider Trading is that investors who want to make transactions with a company feel cheated and do not receive fair protection for their rights.

3.2 Capital Market

Capital Market (*Capital Market*) is a business sector that trades securities (Securities) such as shares, certificates, and bonds. In the classical sense, it is defined as a business sector trading securities such as shares, share certificates and bonds or securities in general. It is a meeting place for sellers and buyers. The Capital Market is different from the concrete market because in the Capital Market, what is traded are securities (Securities) (Septia & Yulianingsih, 2021). The definition of Securities, as stated in article 1 point 5 of Law Number 8 of 1995 concerning Capital Markets, is: "securities, namely debt securities, commercial securities, shares, bonds and futures contracts on securities (securities)."*Insider Trading* "refers to the practice of "insiders" carrying out illegal securities transactions using exclusive information they have that is not yet available to the public or investors. Initially, the definition of *insider trading* only concerned transactions carried out by "Insiders." However, as time goes by, the limitations of *Insider Trading* have become numerous because the regulations that have been made have to be adapted to the needs in order to create order in the Capital Market by accommodating all parties concerned without anyone feeling disadvantaged (Yitawati & Sumanto, 2020).

3.3 The Role of the Financial Services Authority in Determining Violations in the Capital Market

The general explanation from UUPM (Capital Market Law) is that the function of the capital market is to create a continuous market (*Creation of a continuous market*) for Securities that have been offered to the public, creating fair and equal prices (*Fair price determination*) for Securities, through supply and

demand mechanisms and aid in spending in the business world *(aid in financing industry)*. Information disclosure (disclosure*)* is one of the unique characteristics of the capital markets sector. This is one of the most critical factors in the development of the Capital Market because information disclosure contains material facts that investors will consider when deciding to buy or sell shares or retain them. Investors who invest their money in the Capital Market receive protection from the Capital Market Law (UUPM) through the principle of information disclosure. The principle of information disclosure is mandatory for Issuers.

Public Companies and all those involved in the Capital Market must report the actual condition of the company to the Financial Services Authority (OJK) and announce it to the public to avoid losses resulting from fraudulent acts or other illegal practices. The principle of information disclosure in the Capital Market aims to create an efficient market mechanism to avoid and minimize events that result in investor losses. By implementing the principle of information disclosure, investors can gain access to material information or facts. If there is no obligation to disclose information, it will be easier for investors to obtain material information or facts.

Uneven information for investors that is not disclosed or material facts that have yet to be available to the public but have been *disclosed* to certain people will be detrimental to other investors. According to Government Regulation no. 46 of 1995 concerning Procedures for Audits in the Capital Markets sector Article 2 paragraph (2), OJK has the authority to carry out investigations related to violations in the Capital Markets sector, namely requesting information and confirmation from parties suspected of committing or being involved in violations of this law and or implementing regulations or other parties if deemed necessary; Require parties suspected of committing or being involved in violations of this law or its implementing regulations to carry out or not carry out specific actions.

Examine and make copies of records, books and other documents, whether belonging to the party suspected of committing or being involved in a violation of this law and its implementing regulations or belonging to another party if deemed necessary, and Establish conditions and allow parties suspected of committing or being involved in violations of this law and its implementing regulations to take specific actions necessary to resolve the losses incurred. Regarding this *Insider Trading violation*, the OJK examined and investigated its implementation. Based on the UUPM, the Financial Services Authority gives Civil Servant Investigators (PPNS) authority.

Civil Servant Investigators are civil servant officials appointed and given the authority to carry out investigations into certain violations within the scope of statutory regulations so that they become the legal basis. Civil Servant Investigators through the Financial Services Authority are assigned to conduct examinations and investigations into Insider Trading practices. The inspection procedures and requirements are regulated in PP No. 46 of 1995 concerning inspection procedures in the Capital Markets sector as follows: Reports, notifications or complaints from parties regarding violations of laws and regulations in the Capital Markets sector. Failure to fulfill obligations carried out by parties who obtain permits, approval or registration from the OJK or parties who are required to submit reports to the OJK. There are indications of violations of laws and regulations in the Capital Market sector.

3.4 Arrangements for Settlement of Insider Trading Practices in the Capital Market

Handling and resolving insider trading practices must be done and enforced by all stakeholders, in this case, the Financial Services Authority, including the banking industry, capital markets, mutual funds, finance companies, pension funds, and insurance. Indonesian positive law regulates that the Financial Services Authority, as a stakeholder and capital market supervisory institution, is currently required to assist and resolve violations that occur in the Capital Market. When handling and resolving Insider Trading, law enforcement against Insider Trading perpetrators in Indonesia is carried out by the Financial Services Authority, the Prosecutor's Office and the courts.

However, the reality is that in terms of enforcing the supremacy of law in the Capital Market environment, it is still very confusing where in the UUPM (Capital Market Law), it is regulated that the person who is the investigator in the event of a violation in the Capital Market environment is a Civil Servant Investigator within the Services Authority. Finance meanwhile, according to the Criminal Procedure Code (KUHAP), Article 1 states that those responsible are Indonesian State Police Officials and certain Civil Servant Officials who are given special authority by law to carry out investigations. In this case, by article 101, paragraph 6 UUPM, the position of the National Police is only as an assistant investigator for the Financial Services Authority in case of violations occurring in the Capital Market environment. Very few violations have occurred in the Capital Market, which has been successfully processed to court. Specifically for violations in the Indonesian Capital Market, the rules and legal solutions still need to be clarified, especially the practice of Insider Trading in Indonesia, which is one of the things most frequently carried out by related parties, whether it involves private issuers or state-owned companies.

This game in the capital market is very profitable because of its enormous benefits. Prohibitions and threats given to insider trading actors are expressly

prohibited in the Capital Markets Law. However, the prohibitions and threats provided by the law are only written and not regulated clearly. The proliferation of insider trading practices *in* the Indonesian Capital Market is partly caused by *conflicts of interest* and the high level of affiliated relationships or parties classified as insiders. Because the market activity system still adheres to "friendship" affiliation or fellow cronies, do not be too surprised and pretend not to know that Indonesia has designed a market system suitable for the mentality of perpetrators of violations.

Sanctions given to insider trading practices in Indonesia are often only in the form of administrative sanctions, namely fines, by looking at it from the perspective of Fiduciary Duty (trust) of the person in the company who committed the violation. In fact, the laws and regulations concerning Capital Markets (UUPM) state that insider trading is a criminal offense. It has been regulated in UUPM with both administrative and criminal sanctions. Insider trading practices should not only receive administrative sanctions but also criminal sanctions so that they can have a deterrent effect on the perpetrators. The Financial Services Authority Law (OJK Law) only regulates universally regarding authority and inspections if a violation occurs as regulated in Government Regulation of the Republic of Indonesia Number 46 of 1995 concerning procedures for inspections in the Capital Markets sector.

However, the regulatory elements implemented by the Financial Services Authority regarding violations in the Capital Market, namely insider trading, are weak in evidentiary strength, so they cannot be categorized as a resolution for violations of insider trading practices. To anticipate this, everything is fine if the Indonesian Capital Market makes decisions based on regulations implemented in other countries, especially the United States. According to the provisions in force in America, not only can people with Fiduciary Duty (trust) be called insiders, but people who have no relationship at all or who get information accidentally can be said to be insiders. As is known, the legal system in Indonesia currently adheres to the Continental European legal system adopted from the Netherlands, namely based on the principle of concordance. In contrast, the Capital Market adheres to legal elements in the Anglo-Saxon legal system developed in the United States, resulting in a lack of knowledge and related handling and resolution—violations of the Indonesian Capital Market.

Another weakness of the Financial Services Authority Law is that it lacks the authority to penetrate the accounts of Capital Market players suspected of committing violations. Therefore, the Capital Markets Law requires that the OJK Law (Financial *et al*., Law) be amended to have the "power" to access securities, bank account data and other financial institution data. Through this method, it is hoped that Capital Market violations can be minimized and resolved. Because currently, it is tough to trace the traces of perpetrators of Capital Market violations, the Financial Services Authority does not have the authority to directly access account data of people suspected of committing violations.

Another thing that caused this insider trading case to never end up in court is the difficulty in finding evidence; this is one of the main reasons that the reduction should have been carried out seriously, and, ultimately, this case did not go to court. Another problem that is often complained about is mainly caused by trading in the Capital Market, which is generally carried out electronically, while on the other hand, our law needs to accommodate electronic evidence fully. It must be admitted that this violation is not straightforward to discover, let alone resolve because the current legal system in Indonesia needs to support it. Therefore, it is necessary to consider the future harmonization of existing legal provisions with developments in legal needs themselves.

3.5 Obstacles in Revealing Insider Trading Cases

The Capital Markets Law (UUPM) is a legal system from the Anglo-Saxon system. This can be seen by legal institutions that do not exist in the Indonesian Civil Law system (Continental Europe), which do not recognize share ownership, insider trading (trading through insiders), scripless trading, margin trading, hedging, etc. In the explanation of Article 95 UUPM, it is only stated that what is meant by Insider, in this article, are commissioners, directors or employees of Issuers or Public Companies. At first glance, the explanation of Article 95 letter (a) looks straightforward. There are no different interpretations regarding commissioners and directors. Another area for improvement is the status of the Issuer.

The explanation in Article 95 letter (a) needs to provide further explanation regarding what is meant by an Issuer employee. This ambiguity can give rise to interpretations: "whether the Issuer's employees are addressed to its permanent employees only or does it also include its non-permanent employees." Next, there are no restrictions regarding when insiders can conduct transactions after disclosing material facts. The time limit referred to is if a material fact is to be informed by the Issuer or Public Company, then from that point on, Insiders can carry out Securities transactions or still have to wait until a specific time. This problem is a factor that hinders the investigation of *Insider Trading practices*. In the UUPM, the explanation of Article 95 letter (d) only states that the parties mentioned in letters (a), (b), and (c) may not carry out securities buying and selling activities.

This provision only regulates that Insiders are not permitted to conduct securities transactions for their interests within 6 (six) months but does not regulate when a material fact is considered adequate after being disclosed to the public. There are several theories about insider trading. First, the Disclosure or Abstain theory

states that people with employment relationships with issuers are prohibited from trading shares if they have material information that is not yet mature. Second, the Fiduciary Duty theory states that everyone must sacrifice personal interests for the company's interests. Third, the Misappropriation theory states that transactions based on unintentional information from insiders are considered insider trading.

This theory maintains an equal distribution of information on the trading floor. The Capital Markets Law applies in Indonesia based on the fiduciary duty theory as it applies in the United States. However, the application of the Misappropriation Theory in Indonesia has yet to be implemented, including stock trading based on information unavailable to the public. Insider trading cases are challenging to prove because they involve the use of information that should be public for personal gain, in contrast to conventional theft, which involves stealing other people's property. UUPT No. 40 of 2007 concerning Limited Liability Companies (PT) Article 92 paragraph (1) adheres to Fiduciary Duty, which regulates "The duties and responsibilities of directors are to carry out the management of the Company for the interests of the Company and by the aims and objectives of the Company."

Fiduciary Duty is the responsibility of the directors to carry out the company's management for the company's interests and in accordance with the aims and objectives of the company. Fiduciary Duty also applies to parties related to securities companies or issuers in the capital market, such as shareholders, employees, directors and commissioners, notaries, legal consultants, translators, public accountants, and other companies collaborating with securities companies or issuers., the bank, government administration staff, relatives and relatives of the parties involved, and parties directly related to them.

Parties bound by Fiduciary Duty must maintain the confidentiality of material information they know about the securities company or Issuer based on the trust and loyalty given to them. They are prohibited from carrying out securities transactions based on this information. However, the scope of Insiders whose Fiduciary Duty burdens is minimal. According to Article 95 UUPM, the scope only includes commissioners, directors or employees of the Issuer, significant shareholders of the Issuer, individuals who obtain information based on their professional position or business relationship with the Issuer or public company and parties who, in the last six months have no longer been parties to the issue and mentioned previously.

4. CONCLUSION

From the discussion above, I can conclude as follows: Regulations regarding Insider Trading in Indonesia are already regulated in the Capital Markets Law, but Indonesian positive law does not yet regulate matters that are more important than just regulating sanctions for public companies or issuers, namely regarding the legal protection of public investors. No regulation provides proper legal protection between existing regulations and empirical practice, which needs to be implemented well (Das Sollen and Das Sein are not balanced). So, the impact of insider trading in the capital market is that there is injustice between other investors who obtain material information from "insiders" who carry out securities transactions using exclusive information they have that is not yet available to the public or investors.

The role of the Financial Services Authority (OJK) in enforcing laws in the Capital Market sector still needs to improve. This can be seen from the fact that the regulations made by the Financial Services Authority regarding Capital Market violations, namely Insider Trading, cannot be adequately resolved due to the difficulty of providing evidence so that it cannot be adequately resolved. Even filing violations in the capital market sector with the judiciary to deter insider trading perpetrators, but only resolve them administratively within the capital market supervisory agency itself. Thus, this Insider Trading Practice will continue to occur. The suggestions that can be given in this article are that there is a need for further explanation regarding the laws and regulations in the Capital Market which regulate the legal protection of investors so that investor confidence in the Capital Market increases because if investors no longer trust the Capital Market then It also has an impact on the country's economy, of course the Financial Services Authority as a supervisory body in the financial sector in the future must be able to regulate more regulations so that they can be implemented better in Indonesia.

The Financial Services Authority must pay more attention to investors regarding the resolution of the Insider Trading practice itself because many people suffer losses due to this violation. However, it is only resolved by imposing administrative sanctions, even though the Capital Markets Law has provided several regulations regarding violations. They exist in the capital market but take criminal sanctions so that the perpetrators feel the deterrent effect is still unrealized. Ultimately, this practice always stagnates at the level of investigation and investigation; the Financial Services Authority must make better regulations regarding resolving these Capital Market violations. Of course, there is much harm to investors in creating an effective, safe and reliable capital market. Also, the Services Authority (OJK), as a supervisory institution in the financial services sector, must be more assertive in carrying out its duties by the provisions of existing laws.

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