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Existence of The Principle of Openness and Legal Protection for Investors Due to Insider Trading Practices in Securities Transactions in The Capital Market

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ABSTRACT

The principle of openness is fundamental in maintaining transparency and fairness within the capital market, ensuring that all investors have equal access to essential information. This study explores the existence of the principle of openness and the legal protection available to investors affected by insider trading practices in securities transactions. Insider trading, where individuals with privileged access to non-public information exploit this for personal gain, undermines market integrity and investor confidence. The study uses qualitative research methods, including literature reviews and case analyses, to examine the effectiveness of current regulations in protecting investors from the adverse effects of insider trading. The findings highlight that while regulatory frameworks exist to promote transparency and prevent insider trading, enforcement remains a significant challenge. The study emphasizes the need for stricter regulations and more robust enforcement mechanisms to ensure that the principle of openness is upheld and that investors receive adequate legal protection. Additionally, the research points to the necessity of improving market surveillance and increasing penalties for violations to deter insider trading effectively. This article concludes that the reinforcement of the principle of openness is critical to sustaining trust in the capital market. Legal reforms and enhanced regulatory practices are essential to safeguarding investors from the detrimental impacts of insider trading, thereby fostering a more transparent and equitable market environment.

1. INTRODUCTION

In the era of globalization, the rapid development of human civilization has significantly impacted economic systems, both nationally and globally. Central to these systems is the capital market, a key institution that facilitates economic transactions and plays a strategic role in strengthening a nation's economic resilience. As such, the capital market attracts not only parties in need of funds and those who lend them but also the government. The Indonesian government has made significant efforts to revitalize the capital market, recognizing its potential to mobilize public funds and attract foreign investment. Despite these efforts, many local investors remain hesitant, often due to a lack of understanding of the capital market's role and functions.

The Indonesian capital market, governed by Law Number 8 of 1995, has become a dynamic

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institution in a developing country context. This law focuses on the activities and actors within the capital market, aiming to ensure its sustainability and provide legal certainty. However, challenges persist, particularly in the form of insider trading, where insiders leak non-public information to other investors, violating the principle of transparency and harming investor interests. Insider trading remains a significant issue in the capital market, prompting our group to explore the implications of this practice and the existing legal protections for investors in our study titled "The Existence of the Principle of Transparency and Legal Protection for Investors Due to Insider Trading Practices in Securities Transactions in the Capital Market." This paper seeks to address two main questions: the impact of insider trading on the principle of transparency in Indonesia's capital market and the extent of legal protection for investors against such practices. (M. Irsan Nasarudin and Indra Surya, 2004).

2. METHOD

This study employs a qualitative research approach, utilizing literature review and legal analysis to explore the existence of the principle of openness and legal protection for investors against insider trading in the capital market. Primary legal sources such as Law Number 8 of 1995 concerning Capital Markets, Government Regulations, and regulations from the Financial Services Authority (OJK) form the basis of the analysis. The study also incorporates relevant secondary sources, including academic articles, legal commentaries, and case studies, to provide a comprehensive understanding of insider trading practices and their impact on investor protection. Data is systematically collected and analyzed to identify key issues and propose potential solutions for enhancing legal safeguards in the Indonesian capital market. (Najib A. Gisymar, 1999).

3. RESULT AND DISCUSSION

A. The Impact of Insider Trading on the Capital Market in Indonesia in Relation to the Principle of Transparency

The birth of Law Number 8 of 1995, namely the Capital Market Law, is one proof that the Capital Market deserves very serious attention in order to regulate the operations of this institution properly and in a patterned manner. However, it does not mean that with the existence of this Law, all problems related to the Capital Market can be resolved by simply referring to this regulation. There are still many forms of deviations and violations in the Capital Market that are not optimally covered by the provisions contained in Law Number 8 of 1995. One of the violations in the Capital Market is a Capital Market crime related to insider trading. In fact, if observed, this Insider Trading action has a very severe impact, especially it will harm many parties and is dangerous for fair and efficient market mechanisms. (Munir Fuady, 2001).

The principle of openness of information or called the Disclosure Principle must be applied to companies that go public, this is because companies that have gone public carry the interests of the community and are required to provide protection to investors. The application of the disclosure principle in the capital market experiences a fairly complicated dilemma, namely in addition to maintaining a balance between the interests of the company to maintain company secrets on the one hand and the rights of shareholders to protect their investments on the other hand, so that this is a dilemma. With the increasing number of capital market players, it is possible that there will be violations committed by capital market players of existing capital market regulations. Violations of the rules of the game in securities transactions

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are often caused by the weak supervision system carried out by the stock exchange managers and stock exchange supervisors, so that if there is a violation of securities transactions due to manipulation, misleading information or insider trading, it is difficult to detect early. (Donny Widhiyanto, 2003).

With the existence of openness (Disclosure) then indirectly will provide protection to investors if in making a share purchase agreement by investors then there is fraud in the form of misleading actions. This is caused by information, exclusive which is very valuable regarding the condition of the company from the issuer is already known to the public and the one who leaks this secret is an insider who is very potential to know the information in question. Furthermore, regardless of whether the information is published intentionally or unconsciously, the most important thing is that the action can be categorized as an Insider Trading crime. (Budi Untung, 2011).

The prominent problem in the insider trading provisions as contained in the Indonesian Capital Market Law is related to the provisions on insider categories that are not yet adequate. On the one hand, the provisions on insider categories in the Capital Market Law have similarities with those that have developed in the United States capital market regarding insider categories. However, not all insider categories are the same between the Indonesian Capital Market Law and the United States capital market regulations. This means that insiders do not only adhere to the traditional insider category, such as commissioners, directors, major shareholders and company employees, because the insider category is based on someone who has a fiduciary duty. (I. Nyoman Tjager 1996).

Insider trading occurs when someone buys or sells shares based on information from an insider that is not public. The position of investors who obtain information from insiders is better than other investors in stock trading. They conduct unfair stock trading. This is because insider trading creates distortions in stock prices because the stock prices are not reflected based on efficient market information. To avoid potentially detrimental consequences and protect investors from insider trading practices, insider trading is categorized as fraud. The Indonesian Capital Market Regulation has also made a prohibition on insider trading. (I Putu Gede Ary Suta, 2000).

According to legal experts, insider trading is a form of prohibited securities transaction. This is caused by, among other things:

1. Insider trading is harmful to fair and efficient market mechanisms. It will result in:
   a. Unfair price formation (informed market theory). The price formation is caused by the lack of uniform information owned by stock exchange players, meaning that it is only owned by insiders or a certain group of people who have access to insiders.
   b. Unfair treatment among market players (market egalitarianism theory or fair play).
   c. Dangerous for the survival of the capital market. The loss of investor confidence in the stock exchange will cause changes in its investment policies and eventually the stock exchange will no longer be considered an alternative source of profitable financing.
2. Insider trading has a negative impact on issuers. The loss of investor trust in issuers is one of the causes of the loss of positive investor views, and if this happens, it is difficult for issuers to regain public sympathy. This will have a broad negative impact both in terms of economic aspects, resources and existing market share.
3. Losses for investors. The losses are caused because investors buy securities at expensive prices and sell them at cheap prices, so investors feel disadvantaged and do not get protection.

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4. Confidentiality belongs to the company (business property theory), meaning that company secrets cannot be used at will by the holder of material information, this will result in widespread economic losses for the company.

The impact of insider trading on the capital market in Indonesia is very detrimental to investors who do not have access to insiders, and capital market laws in Indonesia still use fiduciary duty in determining insider trading crimes , where Indonesian capital market laws are a product of Anglo-Saxon , but countries such as the United States have now abandoned the fiduciary duty theory (determining insiders with the traditional insider concept) by developing a new concept of misappropriation theory to ensnare insider trading perpetrators. (I. Nyoman Tjager, 2001).

B. Legal Protection for Investors Against Insider Trading Practices in the Capital Market in Indonesia

Legal protection of investors is one of the keys to the success of the capital market, both as an alternative financing and investment vehicle. Without legal certainty, especially law enforcement for violations in the capital market, it is certain that investors will be reluctant to invest their capital. Basically, UUPM has laid the foundation for law enforcement for every violation of capital market activities, namely:

1. Administrative sanctions (Article 102 UUPM),
2. Criminal sanctions (Article 103 UUPM),
3. Civil claim for damages (Article 111 UUPM).

The issue of law enforcement in the capital market is important considering that the capital market is an economic activity that is vulnerable to various violations, one of which is insider trading, Chapter XI Article 90-Article 99 Concerning Fraud, Market Manipulation and Insider Trading, which explicitly classifies these violations into criminal acts. Romli Atmasasmita is of the opinion that UUPM is an administrative law that is given the power of sanctions, both administrative sanctions and criminal sanctions. UUPM is not a special criminal law even though it contains provisions on sanctions, so that every criminal violation of UUPM is more appropriately referred to as a criminal act in capital market practice activities, not a capital market crime.

It is necessary to consider that criminal sanctions are no longer an alternative to administrative sanctions for criminal acts in the capital market. In other words, changing criminal acts from the principle of ultimum remedium to premium remedium. The Securities Exchange Commission (SEC), for example, and countries with advanced capital markets, make insider trading perpetrators a top priority target whose perpetrators end up in prison. This is based on the idea that the capital market is a business activity that relies on investor trust. Insider trading not only damages investor trust, but also contradicts the principle of investment in the capital market, namely information transparency. The difficulty of implementing criminal sanctions in Indonesia cannot be separated from the complete evidentiary system. This is difficult to do in a unique capital market because evidence is very difficult to obtain, so the examination process often stops due to insufficient evidence.

UUPM is considered to be less supportive of investor protection, because the regulatory principles of Law No. 8 of 1995 concerning Capital Markets do not yet adopt the misappropriation theory, so when insider

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trading practices occur, it is not effective in providing legal sanctions for insiders involved in insider trading because Law No. 8 of 1995 concerning Capital Markets still adopts the theory of trust relationships (fiduciary duty theory). (Bismar Nasution, 2001).

The misappropriation theory states that anyone who uses inside information or information that is not yet available to the public to trade shares based on that information is categorized as an insider. Even though the person doing the trading does not have a fiduciary duty to the company. (Azril Sitompul (et.al), 2007).

If Article 95 is examined more deeply, there are still legal loopholes used by insiders, or outsiders who receive information (Insider) to carry out prohibited securities transactions or Insider trading. Article 95 of Law Number 8 of 1995 only covers people in the capacity of Fiduciary duty theory, so that the perpetrators who fall into the category of Misappropriation theory will almost certainly be spared from implementation. Article 104 of Law No. 8 of 1995 is regarding the sanctions that can be imposed on perpetrators of Insider trading article 104 of Law No. 8 of 1995 clearly states that the crime of insider trading is punished with a maximum fine of 15 billion rupiah and a maximum imprisonment of 10 years. (Erman Radjaguguk, 1996).

In addition to UUPM, legal protection for investors is the SIPF (Securities Investor Protection Fund) institution. SIPF is an institution established by OJK (based on OJK regulation Number 49/POJK.04/2016) to protect investor assets in the capital market from losses caused by the risk of crime by employees or management of securities companies and the risk of bankruptcy of securities companies. Risks due to market conditions and other investment risks are not included in the types of risks protected by SIPF. PT Penyelenggara Program Perlindungan Investor Efek Indonesia (P3IEI) or known as the Indonesia Securities Investor Protection Fund (Indonesia SIPF) during 2016 has succeeded in collecting investor protection funds (DPP) of up to IDR 120.5 billion or growing by 21.97%. The Investor Protection Fund is a collection of funds established based on the regulations of the Financial Services Authority (OJK) to protect investors from the loss of investor assets. And in 2017 the maximum limit of investor compensation is targeted to increase to IDR 150 million. (Sean P. Leuba, 1996).

Legal protection for investors due to insider trading is actually still lacking, due to the lack of regulations governing the punishment or criteria for insider trading perpetrators that are increasingly developing following developments such as in the United States. Because legal protection for investors is very necessary if insider trading occurs. This legal protection can be done in 2 ways, namely by providing legal certainty through laws and regulations and legal certainty through law enforcement. With legal certainty through laws and regulations, it will provide protection to investors to obtain complete, accurate and correct information so that investors can make the right decisions because they are supported by strong information. In addition, the existence of legal certainty through law enforcement carried out by Bapepam (now OJK) by taking preventive actions, namely in the form of rules, guidelines, guidance, and direction and repressive actions, namely in the form of examinations, investigations, and the application of sanctions will be able to build trust from investors in the capital market itself. (IG Raywidjaja, 2001).

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4. CONCLUSION

The principle of openness, or the Disclosure Principle, is crucial for ensuring fairness and protecting investors in the capital market. In Indonesia, the impact of insider trading is significant as it undermines the principle of transparency, disadvantaging investors without insider access. While Indonesia's capital market law still relies on fiduciary duty, similar to the Anglo-Saxon model, other countries like the United States have advanced by adopting the misappropriation theory to better address insider trading. Legal protection for investors in Indonesia is currently insufficient due to outdated regulations and enforcement practices. Strengthening investor protection requires comprehensive legal frameworks and effective enforcement by authorities like OJK, including preventive measures and rigorous investigations to enhance transparency and build investor trust.

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