ANALYSIS OF INSIDER TRADING PRACTICE RELATING TO LAW PROTECTION EFFORT FOR MINORITY SHAREHOLDERS

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ABSTRACT

This article aims to describe the characteristics of insider trading according to the Law Number 8 of 1995 on Capital Market and the implication with legal effort that can be taken by minority shareholder. The characteristics of insider trading according to the Law Number 8 of 1995 on Capital Market are in line with fiduciary duty theory principle, there is involvement of insider by the misappropriation trusted. Insider trading has impacts to the other investors, especially to minority shareholder. The difference opportunity to do transaction causes financial disadantages, and for the loss, minority shareholder can doing legal effort, submit their civil lawsuit to the insider trader.

Keywords : capital market, insider trading, minority shareholder

A. INTRODUCTION

Share market is an indicator of economic growth beside banking and other direct investment, such as insurance, property, gold and so on. Share market development aims to face business growth, encourage community faster to invest in go public companies, and motivate community to participate in funding management, so it can be used productively to support national development cost (Nindyo Pramono, 2013: 2). Share market has been an investment option by community sue to the highly regulated sector and it is regarded to provide law certainty for investors.

Besides, share market is business implementing rule of Good Corporate Governance fixed and syrely. Good Corporate Governance is a main issue in developed countries and is one of economic performance indicator as well as

a determiner of community welfare (Alessio M. Pacces, 2012: 1-2). Practice and implementation of Good Corporate Governance principally comprises of two models, namely (1) Model *"*market based*"* focusing on profit and value of share holders and (2) wide group approach model (Martin Hilb, 2011).

Transactions in share market pass through the both models, although it tends to "market based*"* like in Anglo-American countries. Anglo-American countries mostly use outsider system by spread share ownership structure (Indra Surya & Ivan Gunawan, 2006; 11-13). It is suitable with investment in share market.

Information is a highly important component in investment. It is due to by information, investors decide whether they buy, sell, or keep the shares. Relating to the existence of information, an important thing in security industry is the way to maintain the availability and spread of information to as many as investors and in short time pass fair principles. Material information spread must be done quickly and wide spread with purpose, each side gets information simultaneously without give benefit for one side. Spreading information gives same opportunity for each investor to conduct fair transaction activity, with no certain side is adverse because of late information or other side get information faster.

Based on the explanation above, the use of insider information is prohibited thing in share market. It is due to the use of insider information by insiders, or other sides having relation to insiders causing benefits for the sides financially and causing lose for other side or investors (Hamud M.

Balfas, 2012: 464). Insider information use to emitted share transactions before disclosed information by emitter is known as insider trading.

Insider trading is crime in capital market has been prohibited in article 95 law No. 8 year 1995 about share market (it is called UU PM). Insider trading is defined as practice, which corporate insiders have security transaction by using exclusive information they have which does not publish and known by community or investors (Najib A. Gisymar, 1999: 31). Insider trading is an issue relating to share transaction activity begun when insiders know important and confidential information, then they give the information to other sides to use in share trading (Made Dwi Juliana, dkk, 2013: 3).

Insider trading practice has been occurred in Indonesia, such as insider trading case in share trading of PT. Fiskar Agung Perkasa, Tbk (2000), PT. Sugi Samapersada Tbk (2005) and PT. Perusahaan Gas Negara Tbk (2007). Insider trading doers have been fined with administrative sanction by Share Market and Financial Institution Supervisory board (it is called as Bapepam-LK).

Law maintenance on insider trading practice is still restricted by proofing process and regulation about insider trading are not progresive. The prohibition of insider trading crime in covenant of UU PM cannot caught sides using insiders' information to have transaction of emitted share without the involvement of the insiders directly. Moreover, covenant about insider trading in UU PM only caught sides involved with emitted trust misuse (fiduciary duty).

The difficulty in verification causes such threat for investors because insider trading causes the difference of opportunity to have transaction among investors. Insiders having strategic position in emitter potentially have faster information access than public. The position is reversed with public or minority shareholders, where the sides can only know material information existence when it has been disclosed by emitter. The position of minority shareholders, which have no wide access on emitter, always get impact of insider trading. When insider trading sides have transaction based on the information they have, the minority shareholders do not know the information, so that they have not done their transaction activity.

The transaction activity is done by insider trading performers on the old share price with no any significant price movement, because the material information has not been disclosed. The price before and after disclosing are different, for example when the material information is negative, the share price moves down. Similarly, when the material information is positive the emitter share price moves up. Before the movement, insider trading doers have transaction activity to get benefit or avoid material adverse for themselves.

The different chance occurred by insider trading practice give benefit for insider trader and cause financial adverse for other investors, especially minority shareholders. Unfair share market, which is regulated and efficient causes the decrease of investor and applicant trust in share market in Indonesia. The minority shareholders generally just keep silent with insider

trading di pasar modal. The minority shareholders tend to keep silent because they do not know what they should do and to whom they report the case.

B. PROBLEM STATEMENT

Based on the problem the writer has elaborated above, the problems studied in the article are:

1. How is the characteristics of insider trading in Law Number 8 of 1995 on share market?
2. What are legal action taken by minority shareholders when there occur insider trading?

C. RESEARCH METHODS

This Research method is theoretical legal research and using descriptive approach. Tools and techniques for collection of data is secondary sources. This is a normative legal research, by collecting secondary data including primary, secondary, and tertiary legal materials related insider trading practice relating to law protection effort for minority shareholde . Library research was employed to collect the data, while data analysis used legal interpretation.Secondary sources are Law Journal, articles and textbooks. The research will be guided with the collection of the material, for academic legal research can be purely descriptive, it generally includes normative standpoints and description of the law from the point of view of achieving a particular aim.

D. DISCUSSION AND RESEARCH RESULT

1. Characteristics of Insider Trading based on Law Number 8 of 1995 on Share Market

Insider trading is prohibited action because those, who have insider information and use it to trade share, have special position when

they have insider information face other sides having no insider information. The prohibition of insider trading aims to make sure that information released by company is delivered to public (investor and prospective investor) simultaneously and spread out.

Delivering information simultaneously and spread gives same chance for public requiring information to use it for their interest. It also aims to ensure that there is no any side taking benefit, because of relationship with companies and by law disobedience (Hamud M. Balfas, 2012: 467).

The definition of insider trading is not stated rigidly in UU PM, the covenant relating to insider trading in UU PM merely explain the prohibition of insider trading in share market in Indonesia. It is regulated rigidly in article 95, article 96, article 97 and article 98 of UU PM. Based on the articles, it is stated that sides having insider information, either he is insider or outsider (tippee) is prohibited to have purchasing or selling emitter share or such public company aimed or other company having transaction with emitter or public company.

The covenant in article 95 UU PM states that insider emitter is prohibited to have transaction activity on emitter share when insiders have their insider information. Insiders are prohibited to have transaction based insider information they have because they know material information before it has been disclosed. Further, they have determined the investment decision before other investors know the

information. Insider position having wide access on emitter give special position for them, so it needs limitation for their action.

Principally, prohibition in article 95 UU PM particularly for insider doing insider trading directly, in other word insiders have private transaction activity and the benefit is used for themselves. People categorized as emitter insiders have been stated in explanation article 95 UU PM, that :

Insiders mean :

a. Commisaris, directur, or official of emitter or public company;
b. Main shareholder of emitter or public company;
c. Personal due to their position or profession or due to business relationship with emitter or public company make them possibly to get insider information; or
d. Sides in last 6 months have not become side stated in letter a, letter c mentioned above.

Relating to covenant in letter c, the position meant is position in the institution, board, or government agent. Meanwhile, the business relationship is working relation or partnership in business activity such as customer relation, supplier, contractor, consumer, and creditor of emitter. Explanation relating to letter d, is fixed status of someone as insider although they are not in position stated in letter a, letter b, and letter c in period of 6 (six) months accounted from the beginning the people are not in the position (explanation of article 95 UU PM).

The involvement of insiders in insider trading practice can be done directly, either by provoking or giving insider information to people outside the emitter. The involvement has been prohibited as regulated in covenant of article 96 UU PM, that insider is not allowed to express insider information in their affiliation or the sides suspected to have share transaction based on the information. The expression of insider information, can be done by provoking the sides to have share transaction aiming to get profit either for themselves or for the sides they provoke.

Further in article 97 UU PM, it is stated that people outside emitter (tippee) is prohibited to have share transaction of such emitter and of other emitter based on insider information they have. The prohibition of Insider trading also prevail for outsider (tippee) either trying to disobey law (violence, threat, stealing, and so on) or not trying to disobey law to get material information which has not been disclosed.

Specifically for tippee action, in which they get material information without disobeying law, can be fined by covenant of insider trading when the information they get is limited and tippee disobey the limitation and have emitter share transaction based on the material information they get (article 97 UU PM). People including and belonging to the article 97 UU PM is known as tippee II.

Insider trading prohibition also prevails in share company as stated in article 98 UU PM. The prohibition prevails when the share company knows insider information suggest its customers to have transaction on the emitter share based on the insider information.

Based on the covenant in article 95, article 96, article 97 and article 98 UU PM, insider trading may occur when it accomplish several aspect, those are: (1) there is insider, (2) there is undisclosed material information, (3) there is transaction activity based on the material information.

The insider involvement in insider trading practice can be done either directly or indirectly. The direct insider involvement occurs when the insiders using insider information they have to have emitter share transaction, in which the motivation to do insider trading comes from themselves and the profit they get is for themselves (article 95 UU PM). The indirect insider involvement is giving material information or insider information for outsiders (Pasal 96 UU PM).

The insider involvement is form of trust disobedience by insider due to insider is in fiduciary position having emitter trust and interest. The existence of insider stated in covenant of UU PM is relevant to principle of fiduciary duty theory. In this theory, whoever paid by company to perform the given duty, he has duty for the company to perform it as well as possible (due diligence*)* using

measurement of etic and high level economy (Najib A. Gisymar, 1999: 40).

Including in the duty is keeping the interest and confidential of the company and people having duty are regarded as insider. Insider in this category have trust and confidence relationship with the company, but they do not always work for the company, like consultant, assessor (appraiser), accountant or law consultant of the company. Due to the special relationship, they have access on the insider information or nonpublic information owned by company. Therefore, they are regarded as insider and usually they as known as temporary insider or quasi-insider (Tavinayati dan Yuli Qamariyanti, 2009: 84-85).

Fiduciary duty is defined as duty for side holding trust for others' interests, which the others have high obligation to perform the duty as well as possible with good intention, fair, and responsible. People holding trust are known as trustee, and people giving trust is known as beneficiary (Munir Fuady, 2002: 33 -34).

Relating to the category of insider stated in explanation of article 95 UU PM, the people is stated as performing fiduciary duty as the people know the emitter development and the existence of material information. Thus, they have obligation to have good intention to keep the emitter confidential. Based on the fact, a

transaction is categorized as insider trading when it occurs authority deviant by people having trust relation with emitter or insider.

The logical consequence is that the sides have no insider information directly by insider, and they cannot be said as doing insider trading. A transaction based on the undisclosed material information and give special position, but there is no trust misused by insider is stated that the transaction cannot be said as insider trading crime.

In fact, there are several sides having insider trading action but they cannot be caught by related article of insider trading. The first side is those who have trading of emitter share, in which the insider information is got directly. The side has no effort actively to get insider information, but they passively accept the insider information and having transaction activity based on the information. The side the writer describes is known as tippee I.

Tippee I is emitter outsider provoked or accept passively insider information given by insider and have emitter share transaction based on the information. Tippee I is not involved in prohibited sides doing insider trading by UU PM, due to UU PM merely regulate outsider of emitter trying actively to get insider information from insider (tippee II). In the covenant of article 96 UU PM, it is mentioned the existence of insider action giving insider information or provoking other side to have transaction based on the insider information they get. On the

other side, the covenant does not state the prohibition of the side getting insider information (tippee I) and have transaction based on the information.

The side receiving insider information from insider certainly gets profit from the transaction, since at the moment transaction is done by other shareholder they do not know the material information. It causes unfair for other shareholders. Although the tippee I action result in effect on other shareholders, tippee I cannot be caught by article of insider trading. It is due to in UU PM it is stated that merely sides giving information and the sides receiving information are not included in the prohibition of insider trading practice.

The second side doing insider trading practice but they are not included in prohibition of UU PM is side getting insider information from the second side. The second side is tippee, either tippee I or tippee II. *Tippee* get material information directly from insider then they give the information for other. The information is provided to give more benefit for the side giving information and keep the side from adverse in share transaction.

The sides receiving information from tippee is known as secondary tippee. Based on the covenant of insider trading in UU PM, secondary tippee cannot be punished, since the material component of the article about insider trading states that there must be involvement of insider in giving material information. Conversely, secondary

tippee still get insider information and have been done transaction activity based on the information. The transaction done has given profit for secondary tippee, but when there is no involvement of insider directly, secondary tippee cannot be caught by article about insider trading.

On the condition, action taken by tippee I and secondary tippee have caused formulation of share price in share market becoming unfair and it emerges unfair among shareholders. Transaction activity done first has given different chance to have transaction among shareholders. On the other side, covenant in UU PM, which has not regulated action done by tippee I and secondary tippee becomes gap for sides to continuously do unfair investment in share market in Indonesia.

2. Law Effort of Minority Shareholders toward Insider Trading practice impacts

Principally, shareholders or investors getting impact of insider trading are both majority shareholders and the minority. In this article, writer focuses the analysis on the implication of insider trading practice on the minority shareholders. The position of the minority shareholders in emitter, has no big access to get information immediately. Thus, the minority shareholders know the material information after it has been disclosed by emitter through mass media seen directly by public, like

emitter official web, newspaper, and so on. Based on the condition, the minority shareholders has great possibility to get insider trading impact and feel unfair in share market during the occurrence of insider trading.

The definition of minority shareholders is not explained rigidly in Indonesia regulation. The minority shareholders is defined as independent shareholders meaning personally build in their own names and have no relationship with the officer and majority shareholders. The minority shareholders are not controlling shareholders of emitter. Misahardi Wilamarta proposes the difference between minority and majority shareholders lies in the interest. The majority shareholders generally have great interest toward the company. Because of owning big share in the company makes them having consequence of big adverse. The shareholders do not always have good intention (Misahardi Wilamarta, 2002: 6).

The shareholders either majority or minority have separate relation contractually from the relation or interest, at least they become part of the company or as the owner of the company (Angela Schneeman, 2013: 383). Muhammad Waqas, et al defines the minority shareholders, who often by reason of not being involved in the day to day management of the company, not possess detailed information on the affairs of the company (Muhammad Waqas, dkk 2015: 194).

Referring to article 87 verse (2) UU PM and article 2 verse (2) the regulation of financial service authority No. 11/POJK.04/2017 about

ownership report or change of share ownership of the open company states that each side has at least 5% (five percent) of emitter shares is obliged to report to OJK about the ownership and every change in the ownership.

Based on the covenant, the sides having emitter share at least 5% is regarded as big shareholders. It implies that each action must be reported to OJK as form of open principle implementation. Relevant to the covenant, the shareholders having emitter share less than 5% can be categorized as minority shareholders.

The unfair felt by minority shareholders when there occur insider trading is caused by the different chance to have transaction in share market, which gives special position for certain people and benefit for them. The special position for insider trading doers gives opportunity for them to have transaction activity first than the minority shareholders. It causes the share price is not based on the offer and demand, just because of the information influencing investment decision in same quality.

On one side, the insider trading doers know material information increasing share price. Conversely, the minority shareholders selling their shares to insider trading doers do not know this, causing the selling offer is based on the spread information in the market and in standard price. Based on this condition, insider trading doers have taken benefits because they have bought share in standard price.

The chance difference occurred causes financial adverse for minority shareholders and because of the adverse they propose law effort, which is proposing civil suit. The regulation of share market in Indonesia gives chance for investor, including minority shareholders to propose civil suit when there is disobedience of share market covenant, such as insider trading.

The civil suit proposed for those involved in insider trading, such as majority shareholders, commissaries, directors, emitter officer, outsider having business relationship and partnership with emitter, outsider getting the insider information, share company and other.

The adverse sides can propose civil suit to the authorized court. In this case, the judge's role is very significant to make innovations, particularly in interpreting article 1365 KUHPerdata more flexible. Article 1365 is the most suitable to suit insider trading doers, at least to avoid adverse because of the insider trading (Munir Fuady, 2001: 186).

The suit can be done by each side having adverse and they can ask for repayment lonely or together with other side having same cases from the sides responsible for the disobedience (article 111 UU PM).

The authority of civil legal action given by UU PM is one of ways the minority shareholders do to get repayment because of insider trading action, in which the suit proposal can be done independently without any procedure from certain share market authority.

On the covenant, UU PM does not give explanation about law assistance given to minority shareholders, who want to propose civil suit, so the mechanism is turned to the authorized judiciary. The logical consequence is that each investor, including minority shareholders proposing civil suit, must prepare documents and other proof related to the adverse because of insider trading practice.

The minority shareholders are free in appointing advocator or have their own issue in the judiciary. In accordance with article 111 UU PM, minority shareholders may propose civil suit personally or together with other investors having adverse from lain insider trading action. The way of minority shareholders in proposing suit is suitable with the regulation about civil suit in judiciary and the issue cost is paid by each suitor.

The weakness on the covenant about proposing civil suit by investor experiencing insider trading impact in UU PM has become such attention for the development of share market in Indonesia. The existence of new share market is a way to regulate the civil suit. Further, the civil suit proposal is regulated in law No. 21 year 2011 about financial service authority (it is called as UU OJK) as form of consumer protection in financial service sector.

The financial service authority (it is called as OJK) is an independent institution and free of other side disturbance, having function, duty, and authority of regulating, monitoring, examining, and

investigating as well as protecting consumers. The institution is built having goal to ensure that the whole activity in financial service is held in order, fair, transparent, and accountable; able to realize financial system growing continuously and stable; and able to protect consumers and community interest (Insosentius Samsul, 2013: 156).

Since the release of UU OJK, OJK has ne authority to protect consumers. The protection is done through several ways according to the covenant of article 28, article 29 and article 30 UU OJK. The law protection toward consumers done by OJK is in form of preventing consumer's adverse, complaint service, and law advocacy toward consumers in financial service.

A consumer's protection, which becomes authority of OJK, relates to mechanism of proposing civil suit by investor, including investor getting impact of insider trading. OJK may ask the financial service institution to stop their activity when they are potentially causing adverse for consumers or community. The consumer complaint service is done by preparing complaint documents and mechanism of proposing consumer complaint getting adverse by businessman in financial service. Then, OJK can perform law advocacy by ordering certain action to the financial service institution to solve the consumer complaint, and proposing civil suit for businessman or other side causing adverse for consumers (Agus Suwandono, 2016: 6).

The protection is applied by giving law advocacy such as by proposing suit in case of disobedience of share market covenant causing adverse for consumers (investor) (article 30 verse (1) letter b of 2 UU OJK). The existence of the regulation gives new protection to the investor, especially the minority shareholders in order that they are more guaranteed in investing their capital in share market of Indonesia.

The role of OJK in consumer protection law system is not limited to facilitate consumer protection, not only collecting and becoming mediation institution but also becoming institution advocating consumers in form of law protection. Besides, the form of protection done by OJK involves protection to prevent disobedience and recover consumers' rights when there is adverse on consumers (Insosentius Samsul, 2013: 161).

The covenant of article 30 verse (1) letter b of 2 UU OJK is a follow up of the covenant of article 111 UU PM, in which article 30 verse (1) letter b of 2 UU OJK have been regulated better concerning the way to propose civil suit to the judiciary. It is due to the minority shareholders fight against the insider trading doers, who commonly are sides having special authority causing different position and the disturb the judiciary independence in examining and deciding the cases. By law advocacy of OJK, it is expected that minority shareholders' rights are protected in the process of solving the case in court.

The law advocacy done OJK is based on certain procedure aiming that the law advocacy is proper to target. Before the law advocacy stage, the minority shareholders turn over the complaint report to OJK by a special division of consumers education and protection (EPK).

EPK division specially treating complaint report of the shareholders is consumer protection department (DPLK). Each complaint report, which enters OJK is directed to DPLK first to be analyzed more relating to the objective and purpose of the proposal. The complaint is completed by data and supporting documents as proof that there has been indication of insider trading practice in share market in Indonesia.

The complaint aiming to claim the adverse of minority shareholders because of insider trading, the minority shareholders enclose supporting data about the adverse got, accomplished by number of money asked as repayment.

Further, the complaint would be analyzed by DPLK whether the complaint belongs to the authority of OJK to solve it. The complaint of insider trading case is in the authority of OJK as share market authority. The stage of initial analysis by DPLK is related to whether insider trading really occurred according to complaint report and enclosed supporting documents.

Analysis done by DPLK is only complaint report analysis, so the complaint can be verified the truth and then is delivered to work unit relating to the problem. On the complaint relating to civil solution, the complaint archives is delivered to division of law department (DHUK) of financial service authority. DHUK division is authorized division to do law advocacy toward investor, including minority shareholders having adverse because of deviance in share market covenant, such as insider trading.

The first thing done by DHUK after turning over the complaint bundle is analyzing the complaint report content. The analysis includes whether DHUK is a work unit authorizing to the complaint report. The analysis has been done by DPLK, but they are in similar working environment there must have check and re-check action among work unit. In the analysis stage, there are 2 (two) possibilities happen, namely complaint of the authority of DHUK continued by next analysis or complaint is the authority of other work unit. Thus, DHUK coordinates with DPLK to return complaint bundle.

The complaint is signed by DHUK related to the adverse repayment. Investor complaint ask for repayment for adverse to the side doing insider trading of less than Rp 500.000.000,00. Investor proposing repayment more than Rp 500.000.000,00 is regarded as established and can propose their own suit. The limitation is a sign that law advocacy through legal civil suit is basically aimed for minority

shareholders requiring special accompaniment in solving issue of insider trading in court.

There are, however, several things, which are not regulated further by either UU OJK or regulation of the implementation. The regulation are those related to mechanism of DHUK in doing law advocacy for minority shareholders in taking civil court.

Mechanism of law advocacy of OJK to propose civil suit for investor, including minority shareholders has not been produced. It causes law advocacy done has not been maximum because of unclear things to do.

There are several things unclear in the law advocacy, namely:

a. The position of DHUK in proposing law advocacy is as side given authority by minority shareholders and has role as advocator; or
b. The position of DHUK in proposing law advocacy has to appoint such advocator in judiciary process.

In fact, when the regulation about law advocacy mechanism has not been produced soon, the authority of consumers protection particularly article 30 verse (1) letter b the 2 UU OJK can not be applied well. It means that the law advocacy in civil suit process is only covenant in the regulation and it cannot be realized well.

D. CLOSING

1. Conclusion

a. Covenant of insider trading is regulated in article 95, article 96, article 97, and article 98 of Law Number 8 of 1995 on share market. Based on the covenants, a transaction includes insider trading crime when it accomplish several components, one of them is insider involvement. According to Law Number 8 of 1995 on share market, insider trading occurs when there is disobedience of trust by insiders due to their position in fiduciary position. Characteristics of insider trading is suitable with fiduciary duty theory.

b. Law efforts taken by minority shareholders having impacts of insider trading is proposing civil suit. Minority shareholders are given opportunity to propose civil suit for sides involving in insider trading. The suit of the minority shareholders can be done personally as stated in article 111

c. Law Number 8 of 1995 about share market or through financial service authority as stated in article 30 verse (1) letter b of Law Number 21 of 2011 on Financial Service Authority.

2. Suggestion

a. It needs revision on Law Number 8 of 1995 on share market relating to insider trading practice prohibition, not only for sides having trust relation with emitter (fiduciary duty) but also for sides factually have transaction based on insider information.

b. It needs more detailed regulation concerning mechanism of law advocacy particularly for minority shareholders by financial service authority in the regulation.

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