

THE EXISTENCE OF CRIMINAL SANCTION IN INSIDER TRADING IN THE ACT NUMBER 8 OF 1995 CONCERNING CAPITAL MARKET AFTER THE FINANCIAL SERVICES AUTHORITY REGULATION NUMBER 36/POJK.04/2018

Wahyu Nur Fatimah

Faculty of Law, Universitas Brawijaya Malang, Indonesia

Email: wnurfatimah6@gmail.com

Abstract

This article is written because of the existence of the Securities Exchange Act (UUPM) No. 8 of 1995 concerning criminal sanctions for perpetrators of insider trading crimes. Furthermore, The Financial Services Authority (OJK) issued the OJK Regulation No. 36/POJK.04/2018 ruling sanctions against the insider trading criminals following Una Via principles i.e. the selection between criminal and administrative sanctions. To date, the insider trading criminals have been given only administrative one. UUPM states clearly that such perpetrator is included in crimes, not violation, so they should be given criminal sanction. The article aims to describe the position of criminal sanction toward insider trading criminals after the implementation of the OJK Regulation No. 36/POJK.04/2018 concerning Procedures for Audit in the Capital Market Sector. The author uses normative juridical method in reviewing the legislation by using articles, books, and other literatures related to the problem. The results reveal that the OJK prioritizes administrative sanction and has the criminal sanction as the last option in penalizing the insider trading criminals. Such criminal is forbidden in Islam because they cheat other capitalists.

Penulisan artikel ini dilatarbelakangi adanya Undang-Undang Pasar Modal No. 8 Tahun 1995 memuat sanksi pidana bagi pelaku tindak pidana insider trading, dan pihak Otoritas Jasa Keuangan (OJK) mengeluarkan peraturan baru yakni Peraturan OJK No. 36/POJK.04/2018 mengatur pemberian sanksi terhadap pelaku tindak pidana insider trading menganut prinsip Una Via yakni prinsip pemilihan antara

sanksi pidana dan sanksi administrative. Implementasi peraturan selama ini tindak pidana insider trading hanya dikenakan sanksi administratif. Didalam Undang-Undang Pasar Modal telah dinyatakan bahwa tindak pidana insider trading masuk dalam kategori kejahatan dan bukan pelanggaran, sehingga sanksi yang dikenakan adalah sanksi pidana. Artikel ini bertujuan untuk menjawab pertanyaan bagaimana kedudukan sanksi pidana pada tindak pidana Insider Trading pasca berlakunya Peraturan Otoritas Jasa Keuangan No. 36/POJK.04/2018 Tentang Tata Cara Pemeriksaan di Sektor Pasar Modal. Metode penulisan yang digunakan adalah yuridis normatif yakni mengkaji peraturan perundang-undangan yang juga dibantu dengan artikel, buku, dan literatur lain yang berkaitan dengan permasalahan pada tulisan ini. Hasil kajian menunjukkan bahwa untuk kedudukan sanksi pidana sendiri OJK lebih mengedepankan sanksi administrative dan menempatkan sanksi pidana sebagai pilihan terakhir dalam pemberian sanksi terhadap pelaku tindak pidana insider trading. Tindak pidana insider trading dalam bukum Islam dilarang karena terdapat unsur mencurangi para pemodal lain.

Keywords: insider trading, criminal sanctions, position

Introduction

Insider Trading is one of the criminal acts committed in the capital market. Insider trading is a crime committed by an insider of a company or related party who has exclusive information and has not been released to the public, so that information can affect the price of securities in the capital market.

Securities Exchange Act (abbreviated as UUPM) Number 8 of 1995, which regulated insider trading as a crime, is contained in Article 95: "Insiders from issuers or public companies, who have inside information, are prohibited from buying or selling securities: a) related Issuer or Public Company; or b) other companies that conduct transactions with issuers or related public companies."

Article 96 of the UUPM also states that insiders in the company are prohibited from disclosing such exclusive information to other parties: "Insiders, as referred to Article 95, are prohibited from: a) influence other parties to buy or sell the related securities; or b) providing information to any party who is reasonably suspected of being able to use the information to buy or sell securities."

The action of insider trading in the UUPM is regarded as a crime and there are criminal sanctions, this is regulated in Articles 104, and 110 Paragraph (2): Article 104 UUPM "any party who violates the provisions as referred to in Articles 90, 91, 92, 93, 95, 96, 97 Paragraphs (1), and 98 is threatened with a maximum imprisonment of ten years and a maximum fine of IDR 15 billion". Article 110 UUPM Paragraph (2) "criminal acts as referred to Article 103 paragraph (1), 104, 106, and 107 are regarded as crimes."

Under the UUPM, insider trading perpetrators can get civil lawsuits, and related to eligibility, they can also be criminally prosecuted, but looking at experiences from other countries in resolving insider trading cases, it is more likely to lead to compensation or fines by regulatory agencies of Capital Markets¹. This can happen because of the difficulty of finding evidence of insider trading action. There are two main factors behind the difficulty of proving insider trading as a criminal act.² First, in some insider trading cases, the perpetrators are not categorized as insiders, as stated in Article 95 of the UUPM, namely issuers or securities companies, so that the perpetrators cannot be charged with Article 104 UUPM. Second, related to evidence of the provision of information by the perpetrator to a securities company or other party, which was carried out verbally, and this, of course, did not leave any evidence; therefore, many insider trading cases do not end up in court. In response to this, OJK, as the supervisory body and capital market regulator based on Act Number 21 of 2011 concerning the Financial Services Authority, has an essential role in resolving insider trading cases in the Indonesian capital market by applying administrative sanctions. For this reason, OJK issues regulations related to the imposition of insider trading sanctions. Financial Services Authority Regulation Number 36/POJK.04/2018 concerning Audit Procedures in the Capital Market Sector adheres to the *una via* principle in imposing sanctions on capital market crimes. The *una via* principle³ is the principle of choosing between criminal or administrative sanctions.

The existence of this regulation gives authority to OJK in determining which sanctions will be imposed on perpetrators of insider trading crimes. The *una via* principle is contained in Article 14 Paragraph (2) of OJK Regulation No 36/2018: a) proceed to the investigation level; or b) do not proceed to the investigation level, accompanied by a proposal for determining administrative actions in the form of administrative sanctions and/or written orders.”

According to Islamic Sharia law, insider trading is also an act that cannot be justified because there is an element of cheating others for personal gain. This is contained in QS. Al-Nisa' [4]: 29 which means “O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent ...”

1 Abdullah, M Zen. Preventing Insider Trading Crimes in the Capital Market “. *Lex Specialis Journal*. No. 12, <http://jih.unbari.ac.id/>, accessed on 13 of December, 2020.

2 Romlah, Siti. Paper Tiger in the Regulation for Settlement Insider Trading Cases. ‘Adalah’ Law and Justice Bulletin, Volume 1, No. 1d of 2017

3 Dissertation of DR. Lodewijk Jakob Jan Rogier in Supreme Court Decision No. 1090/B/PK/PJK/2014, p. 16-17

Following the above description regarding the two regulations regarding the imposition of sanctions against the criminal act of insider trading, which causes legal uncertainty related to the sanctions to be given and the view of Islamic Sharia law that prohibits insider trading, the author in this study focuses on examining the position of insider trading criminal sanctions in the UUPM Number 8 of 1995 after the enactment of OJK Regulation No. 36/POJK.04/2018 and what is the view of Islamic Sharia law on the crime of insider trading.

Many studies have discussed insider trading, and the writer took several of them:

Juli Asril, "Insider Trading in the Capital Market as a Business Crime," (MEA (Management, Economics, & Accounting) Scientific Journal: Volume 3, No. 2, 2019). The focus of the discussion is on the prohibition of insider trading practice because it is considered a dangerous crime and has an impact on the broader economy and law enforcement on the capital market for insider trading, which is more focused on imposing sanctions contained in the UUPM.

Fadilah Haidar, "Legal Protection for Investors Against the Criminal Practice of Insider Trading in the Capital Market in Indonesia," (Journal of Cita Hukum, Volume 3: No. 1, 2015). The focus of the study is related to insider trading in general, namely the institutions involved, elements of insider trading, and so on. For legal protection and settlement, it still focuses on the Articles of the UUPM; namely, the protection focuses on administrative sanctions in Article 102 (for the violation category) and Articles 103-110 for criminal sanctions for the crime category.

Fisuda Alifa Mimiamanda Radinda, Monika Ardia Ningsi Massora, and Ricka Auliaty Fathonah, and the title is "Insider Trading Practices as a Violation of the Principles of Information Disclosure in the Capital Market in Indonesia," (Cakrawala Hukum Journal: Volume 11, No. 1, 2020). The discussion focuses on legal protection in three Articles in the UUPM, namely Article 103 for criminal sanctions, Article 111 for claims for civil compensation, and Article 102 for administrative sanctions. Meanwhile, for the principle of information disclosure, it is explained that this principle is mandatory because information disclosure aims to ensure transparency in trading in the capital market so that it causes a fair price. Insider trading is included in the category of violating this principle so that this crime can result in considerable losses in the capital market.

The legal issue related to the position of insider trading criminal sanctions in the UUPM after the enactment of OJK Number 36/2018 is a new legal issue and has never been discussed in any study.

Research Methods

The legal research method used in this research is normative juridical. The process of normative legal research is a literature review or research on secondary data,⁴ so that normative legal research (doctrinal) can also be called a literature review.⁵ Meanwhile, this research is also categorized as doctrinal law research since it is conducted or implemented in written regulations or other law materials. It is also a law study that is intended and can be developed to the adopted doctrine. On the other hand, this research can be included as a literary study or literature review because this research is mainly carried out on data that is only secondary in the literature. This research will focus on examining the Acts and Regulations related to legal issues, especially the UUPM Number 8, 1995, the Financial Services Authority Act Number 21, 2011, the Criminal Procedure Code No. 8, 1981, the Fatwa of the Indonesian Ulama Council (MUI) No. 80/DSN-MUI/III/2011, Financial Services Authority Regulation Number 36/POJK.04/2018 concerning Audit Procedures in the Capital Market Sector.

The author applies the Statute Approach, better known as the legislative approach, which will be the core and significant point of this research. The statutory approach aims as a basis for conducting, reviewing, and analyzing the results of the legislation that has been investigated concerning legal issues. The author will explore relevant ideas by studying the UUPM No. 8 of 1995, the Act of the Financial Services Authority Number 21 of 2011, the Criminal Procedure Code No. 8 of 1981, the MUI Fatwa Number 80/DSN-MUI/III/2011, and OJK Regulation No. 36/2018, to solve the legal issues in this research.

Primary legal materials are the main legal materials that will be used in this research. In normative legal research, the main legal materials contain legislation, official state documents, and official minutes. In this study, the primary legal materials that the author uses are official regulations relating to legal issues, namely the UUPM Number 8, 1995, the Financial Services Authority Act Number 21, 2011, the Criminal Procedure Code Number 8, 1981, MUI Fatwa Number 80/DSN-MUI/III/2011 and OJK Regulation No. 36/2018. Secondary legal materials are all publications on law that are not included in official documents, including textbooks, legal journals, and comments on court decisions.⁶ The secondary legal materials that the author uses in this research are books, online journals accessed by the authors, as well as the opinions of experts related to the capital market, insider

4 Suratman dan H. Philips Dillah, *Legal Research Method*, Alfabeta, Bandung, 2013, p. 66.

5 Bambang Sunggono, *Legal Research Method*, PT. Raja Grafindo Pustaka, Jakarta, 2003, p. 42.

6 Suratman dan H. Philips Dillah, *Op.cit.*, p. 67.

trading, OJK authority, criminal and administrative sanctions, as well as related Islamic views on insider trading. The writers apply several steps in conducting this research. First, the writer collects the materials needed, then codes, and carries out the verification process. All data consisting of various legal materials are collected based on the topic of the problem formulated through literary study. Second, all data consisting of various legal materials were compiled based on the topic of the problem formulated through literary study. Next, the researcher analyzed the materials using a qualitative descriptive method by explaining and describing (interpretively) the Islamic viewpoint on the crime of insider trading and the position of insider trading criminal sanctions in the UUPM after the enactment of OJK Regulation No. 36/2018 based on the value of justice, benefit, and legal certainty, and in the end, conclusions were drawn.

Position of Criminal Sanctions for Insider Trading

Sanctions are burdens, actions, punishments to force people to keep agreements or obey the provisions of the law,⁷ and sanctions are punitive and coercive. Criminal sanctions are misery or suffering inflicted on someone guilty of committing an act prohibited by criminal law. The existence of a sanction is expected to prevent people from committing a crime⁸.

In insider trading, the sanctions used in Article 104 of the UUPM are criminal sanctions, namely imprisonment for a maximum of ten years and a maximum fine of IDR 15 billions. A criminal sanction is a form of legal protection for parties harmed by the criminal act of insider trading. The process of determining criminal sanctions for insider trading is contained in Article 101 Paragraph (3) of the UUPM: "(3) investigators as referred to Paragraph (2) are authorized to: a) Receive a report, notification, or complaint from a person regarding a criminal act in the capital market; b) conduct investigations on the validity of reports or statements relating to criminal acts in the capital market sector; d) conduct investigations against parties suspected of committing or being involved in criminal acts in the capital market sector; e) summon, examine, and request information and evidence from any party suspected of committing or being a witness in a criminal act in the capital market sector; e) conduct audits through books, records, and other documents relating to criminal acts in the capital market sector; f) conduct inspections at every place suspected of storing evidence in books, records, and other documents and confiscate goods that can be used as evidence in cases of criminal

7 Mahrus Ali, *Fundamentals of Criminal Law*, Jakarta, 2015, p. 193

8 *Ibid.*, p. 194

acts in the capital market; g) block bank accounts or other financial institutions belongs to parties suspected of committing or being involved in criminal acts in the capital market sector; h) request expert assistance in carrying out the task of investigating criminal acts in the capital market sector; and i) state the start and end of the investigation.

Based on the description of Article 101, it can be seen that when the supervisory investigator in the capital market conducts an investigation related to the crime of insider trading, the investigator must report when the investigation begins and ends to the public prosecutor (Article 101, Paragraph (5)) under the provisions of the Law of Criminal Procedure. In determining sanctions related to the crime of insider trading, investigators must carry out a series of investigations to find strong evidence of insider trading so that they can be subject to sanctions in accordance with the UUPM. However, in reality, insider trading that have occurred so far have lacked evidence, so that criminal sanctions in the UUPM have never been used, so it would be unfair if someone was sentenced to criminal sanctions but did not have enough substantial evidence. Criminal sanctions cannot be imposed on the UUPM if the elements in the criminal act of insider trading are not fulfilled, namely, if the perpetrator of the crime of insider trading is not included in the insider category under Article 95 of the UUPM. In addition, obtaining evidence related to the crime of insider trading is very difficult because the evidence of this crime is verbal information, which is unlikely to leave evidence so that insider trading cases cannot be tried in court and can only be given administrative sanctions.

In 2018, OJK issued Financial Services Authority Regulation Number 36/POJK.04/2018 concerning Audit Procedures in the Capital Market Sector. This regulation contains an investigation process in the event of a criminal act in the capital market and the imposition of sanctions on criminal acts in the capital market, one of which is insider trading. OJK Regulation No. 36/2018 adheres to the principle of election to the provision of sanctions, namely criminal sanctions or administrative sanctions (*una via* principle). In OJK Regulation No. 36/2018 this principle is regulated in Article 14 Paragraph (2): “(2) the recommendations as referred to Paragraph (1) letter e are in the form of: a) proceed to the investigation level; or b) do not proceed to the investigation level accompanied by a proposal for determining administrative actions in the form of administrative sanctions and/or written orders.”

According to the Article, OJK prioritizes the settlement of insider trading crimes with administrative sanctions, and this is due to several factors, namely: a) difficulty in finding evidence related to insider trading crimes; b) a faster and

more efficient settlement compared to a trial through a court; c) maintaining the credibility of the company and the sustainability of the capital market. This is because the crime of insider trading is detrimental to the capital market, so that if there is an insider trading case that goes to the general court, it is feared that it could cause a significant shock to capital market conditions.

On the one hand, the existence of OJK Regulation No. 36/2018 guarantees more legal certainty related to administrative sanctions. Still, on the other hand, it is contrary to criminal sanctions. With the enactment of these regulations, criminal sanctions are less likely to be used in the event of a criminal act of insider trading. It does not mean that it is no longer used, criminal sanctions can still be used through specific considerations by the OJK in the investigation process. The position of criminal sanctions in the UUPM is a last resort in imposing sanctions on insider trading crimes. The method of determining sanctions for insider trading crimes after the enactment of OJK Regulation No. 36/2018 is contained in Articles 13, 14, and 15 of OJK Regulation No. 36/2018. The following are the contents of Articles 13, 14, and 15:

Article 13 : “(1) The auditor shall make a report on the audit results as a basis to prove the existence of a violation of the provisions of the Acts and Regulations in the capital market sector; (2) The report on the results of the audit as referred to Paragraph (1) shall be submitted to the Chief Executive of the Capital Market Supervisor from the Financial Services Authority.”

Article 14 : “(1) If preliminary evidence is found regarding the existence of a criminal act in the capital market sector in the audit, the report on the audit as referred to Article 13 must contain information: a) acts suspected of violating the provisions of criminal acts; b) Criminal provisions allegedly violated; c) parties suspected of violating criminal provisions; d) goods, letters, and/or documents that support the alleged violation of a criminal act; and recommendations from the auditor to the Chief Executive of the Capital Market Supervisor of the Financial Services Authority. (2) The recommendations as referred to Paragraph (1) letter e are in the form of: a) proceed to the level of investigation; or b) not proceed to the investigation level accompanied by a proposal for determining administrative action in the form of administrative sanctions and/or written orders. (3) The Chief Executive of the Capital Market Supervisor of the Financial Services Authority shall decide based on the recommendation as referred to Paragraph (2). (4) If the administrative sanction as referred to Paragraph (2) letter b is in the form of a fine, the value of the administrative sanction in the form of a fine is a maximum of IDR 5 billion. (5) The written order as referred to Paragraph (2) letter b can

be in the form of: a) an order to return a sum of money to the party who suffered a loss; and/or; b) Orders to correct errors, conditions, and/or circumstances that arise as a result of violations.”

Article 15: “The recommendations as referred to Article 14, Paragraph (1) letter e are prepared to take into account: a) the transaction value of the violation or the impact of the breach; b) the existence to the settlement of the losses incurred as a result of a criminal act; c) consequences of criminal acts against securities offering and/or trading activities as a whole; and/or the impact of losses on the capital market system or the interests of investors and/or the public.”

Based on the Article above, if insider trading takes place, OJK will prioritize the provision of administrative sanctions. Administrative sanctions basically have the nature of restoring the situation as a result of the criminal act committed by the perpetrator. The selection of sanctions based on the Article above does not guarantee legal certainty. The recommendations for consideration in Article 15 of OJK Regulation No. 36/2018 are still very general and less specific. In addition, OJK’s administrative decisions can still allow for lawsuits to arise if the parties who receive losses are still not satisfied; this is because the decisions given by OJK are not final and binding. After the enactment of OJK Regulation No. 36/2018, the determination of sanctions on capital market crimes, one of which is insider trading, is no longer oriented to criminal sanctions contained in the UUPM as a whole but will focus more on Articles 13, 14, 15, and 16 of OJK Regulation No. 36/2018.

Authority of the Financial Services Authority (OJK)

OJK is an independent institution that has an essential role in the Indonesian capital market and has the authority to supervise and regulate the capital market. In terms of regulation, the authority of the OJK is regulated in Article 8 of the Financial Services Authority Act Number 21 of 2011: “To carry out the regulatory tasks as referred to Article 6, OJK has the authority to: a) stipulate the regulation implementation of this Act; b) stipulate Acts and Regulations in the financial services sector; c) stipulate OJK regulations and decisions; d) establish regulations regarding supervision in the financial services sector; e) establish policies regarding the implementation of OJK duties; f) stipulate regulations regarding procedures for determining written orders against Financial Services Institutions and certain parties; g) stipulate regulations regarding procedures for determining statutory managers at Financial Services Institutions; h) establish organizational structure and infrastructure, and also manage, maintain, and administer assets and liabilities;

and, i) establish regulations regarding procedures for imposing sanctions following the provisions of Acts and Regulations in the financial services sector.

In terms of supervision, the authority of the OJK is regulated in Article 9 of the Act on the Financial Services Authority Number 21 of 2011: “To carry out the supervisory duties as regulated in Article 6, OJK has the authority to: a) establish operational policies for supervision of financial service activities; b) supervise the implementation of supervisory duties carried out by the Chief Executive; c) carry out supervision, audit, investigation, consumer protection, and other actions against financial service institutions, actors, and/or supporting financial service activities as referred in the Acts and Regulations in the financial services sector; d) give written orders to financial institutions and/or certain parties; e) make appointments for statute management; f) define the use of statute management; g) establish administrative sanctions against parties that are violating the Acts and Regulations in the financial services sector; and h) grant and/or revoke: 1) business license; 2) business License of an individual; 3) effectiveness of registration statement; 4) notification of registration; 5) approval to conduct business activities; 6) validation; 7) approval or determination of dissolution; and 8) other determinations.

As referred to the legislation in the financial services sector.

Based on the two Articles above, we can see that the authority of the OJK in carrying out regulatory and supervisory duties in the financial services sector, and one of them is the capital market. In conducting investigations into criminal acts of insider trading, the OJK is authorized by Acts and Regulations to become a team of investigators. Some of these regulations include:

The Criminal Procedure Code Number 8 of 1981 Article 1 “Investigators are officers of the state police of the Republic of Indonesia or certain civil servants who are given special authority by law to carry out investigations.”

Financial Services Authority Act Number 21 of 2011, Article 49 “In addition to Investigation Officers of the Indonesian National Police, certain Civil Service Officers with the scope of duties and responsibilities, including supervision of the financial services sector within the OJK, are given special authority as investigators as referred to the Law of Criminal Procedure.”

In addition to the authority to conduct investigations, OJK is also given the power to stipulate regulations related to sanctions given if a crime occurs in the financial services sector, one of which is insider trading, as stated in Article 8 of the OJK Law letter i. OJK is also given the authority to impose administrative sanctions in the event of a violation in the capital market sector, as in Article 9 of

the OJK Law letter g. Insider trading is included in the category of crimes with threats of imprisonment and fines. However, suppose there is a lack of evidence in the criminal act of insider trading, which causes the perpetrator to be unable to be tried in a general court. In that case, the OJK can determine the crime of insider trading as a violation of information disclosure. In the end, the sanctions given are administrative to restore the situation due to insider trading and provide a deterrent effect to the perpetrators.

Insider Trading in Islamic Point of View

Today, stock investment is an instrument that is in high demand by the Indonesian people, and with the majority Muslim population, it certainly raises its own concerns regarding the halal and haram of investing in shares through capital market instruments, considering that capital market instruments are part of the Indonesian economy. Stocks, one of the instruments in the capital market, did not exist at the time of the Prophet Muhammad and his companions. Trade known at that time was actual trade, namely the exchange of goods for goods (barter) or the exchange of money for goods. Proof of ownership of a business has not been represented as shares as today.

In Islam, any business is allowed as long as it does not conflict with Islamic Sharia law, and following guidance: “The law of origin in *muamalat* is permissible unless there is a law that forbids it.”⁹ The purpose of the guidance is that any type of economic transaction from existing ones, such as buying and selling, leasing, trade representation, and so on, is permissible as long as it is not prohibited by sharia, such as businesses that contain gambling, usury, fraud, and so on.

To overcome the obstacle, the Indonesian Ulema Council (MUI) issued the National Sharia Council Fatwa No. 40/DSN-MUI/X/2003 concerning the Capital Market and General Guidelines for the Implementation of Sharia Principles in the Capital Market Sector. Based on the fatwa, stock investment can be done as long as it does not violate the Sharia law adopted by Islam, namely in Article 2, paragraphs 1) the capital market and its entire mechanism of activity, especially regarding issuers, the types of Securities traded, and the trading mechanism, are deemed to have complied with Sharia if they follow Sharia principles; 2) a security is deemed to have complied with Sharia principles if it has obtained a Sharia Compliance Declaration.

9 The second edition of DSN fatwa in 2003 in the articles of Azazy, Yusup, and Rusmani. 2018. Business Principles in the Perspective of Islamic Economic Law. Journal of Islamic Economic Law Vol. V No. 2

According to Yusuf Qaradhawi,¹⁰ shares in the Islamic law are divided into three: 1) shares in companies that are consistent with Islamic Sharia, such as Islamic banks and insurance. Islam allows investing in this kind of business and trading its shares under the condition that these shares are already in the form of a real and profitable business entity; 2) stocks based on unlawful activities, such as stocks of liquor-producing companies, shares of discotheque companies, and stocks according to *ijma'* ulama are prohibited; 3) Stocks with an activity based on Islamic law, but there is an unlawful activity in the transaction process, for example, a car company whose transactions use the usury system.

Even in Sharia stock instruments, insider trading is certainly prohibited. In fatwa Nounumber 40/DSN-MUI/X/2003, Article 5, Paragraph (2) letter c states, "insider trading, using insider information to gain profit on transactions is prohibited." Insider trading is included in prohibited transactions because it can harm other investors, and there is an element of fraud in the business process. In fatwa No. 80/DSN-MUI/III/2011, insider trading is included in the category of prohibited transactions and is known as *ghabn fahisy*. Insider trading is considered an illegal activity in the financial market environment because it aims to seek profit and is usually carried out by utilizing internal information, such as plans or company decisions that have not been published. *Ghabn fahisy* literally means a heavy level, such as buying and selling goods at prices far below the market price. *Ghabn* has the meaning of an imbalance between two goods (objects) exchanged in a contract, both in terms of quality and quantity. In terms of the settlement of insider trading crimes, fatwa Number 80/2011 states that the settlement of criminal acts in the capital market can be done by negotiation for consensus. If no good results are obtained, it can be resolved through the Sharia Arbitration Board or under applicable laws.

Islamic Sharia law equates this insider trading crime with a *bai'u al-hadlir li badin* contract, when people from the city make transactions by visiting the villagers, in which there is an element of fraud because the producers (villagers) do not know for sure the actual base price of a particular commodity¹¹. For this reason, insider trading is prohibited and not justified according to Islamic law in capital market instruments.

10 Yusuf Qaradhawi in Thesis M. Satrika. 2011. Stocks According to the Perspective of Islamic Economics and Its Relevance in Modern Indonesian Investment. Faculty of Sharia and Law, Sultan Syarif Kasim State Islamic University, Riau, Pekanbaru, p. 66

11 Helmi Darmawan. 2018. Investor Protection Due to Insider Trading on the Capital Market in Indonesia in the Perspective of Islamic Law. Faculty of Sharia, Raden Intan State Islamic University Lampung, p. 65

Conclusion

Sanctions for insider trading are mandatory to ensure the sustainability of the capital market, and after the enactment of OJK Regulation No. 36/2018, the primary sanctions for insider trading crimes are administrative sanctions due to factors that hinder the application of criminal sanctions as the primary sanctions. OJK uses criminal sanctions in the UUPM as the *ultimum remedium*¹² or in legal terms, it is considered the ultimate sanction or the last choice in law enforcement if administrative sanctions are deemed unable to resolve the crime.

Financial Services Authority, as the supervisory and regulatory body for the capital market, has special authority to issue regulations related to the capital market and procedures for imposing sanctions in the event of a violation or criminal act in the capital market. Regulations made by OJK are binding on parties involved in capital market activities.

Insider trading in the Sharia capital market has been declared prohibited based on the MUI Fatwa Number 40/DSN-MUI/X/2003 concerning the Capital Market and the Implementation of Sharia Principles in the Capital Market and MUI Fatwa Number 80/DSN-MUI/III/2011 concerning the Implementation Sharia Principles in the Mechanism of Trading Equity Securities in the Regular Market of the Stock Exchange. In the two fatwas, insider trading is included in the category of prohibited transactions and is included in the category of criminal acts, based on Article 5, Paragraph (2) letter (c) Fatwa Number 40/DSN-MUI/X/2003: "insider trading, namely using information from insider to gain profit on prohibited transactions." Fatwa Number 80/DSN-MUI/III/2011 in the third Article regulates prohibition of committing a criminal act of insider trading, namely special provisions and Insider trading is included in the *ghabn fahisy*. According to the fatwa, the settlement of the crime of insider trading is carried out through negotiation for consensus. If no settlement agreement is found, it can be carried out through Sharia arbitration or following the applicable Acts and Regulations.

12 Sudikno Mertokusumo, *Legal Inventions: An Introduction* (Yogyakarta: Liberty, 2014), 128.

References

- Abdullah, M Zen. Desember 2010. *Penanggulangan Kejahatan Insider Trading Di Dalam Pasar Modal*. *Jurnal Lex Specialis*. No 12, <http://jih.unbari.ac.id/> diakses pada tanggal 13 Desember 2020.
- Adirianto. 2015. Politik Hukum Perundang-Undangan Pasar Modal Syariah di Indonesia. *Jurisdiction: Jurnal Hukum & Syariah* Vol.6 No. 2
- Anwar, Jusuf. *Penegakan Hukum dan Pengawasan Pasar Modal Indonesia*. Bandung: Alumni, 2008.
- Asril, Juli. 2019. Insider Trading Di Pasar Modal Sebagai Kejahatan Bisnis. *Jurnal Ilmiah MEA (Manajemen, Ekonomi, & Akutansi)* Vol. 3 No. 2
- Azazy, Yusup dan Rusmani. 2018. Prinsip Bisnis Dalam Perspektif Hukum Ekonomi Islam. *Jurnal Hukum Ekonomi Syariah* Vol. V No. 2
- Fatwa MUI Nomor 40/DSN-MUI/X/2003
- Fatwa MUI Nomor 80/DSN-MUI/III/2011
- Hadjon, M. Philipus Dkk. *Pengantar Hukum Administrasi Indonesia*. Yogyakarta: Gadjahmada University Press, 2008.
- Haidar, Fadilah. 2015. Perlindungan Hukum Bagi Investor Terhadap Praktik Kejahatan Insider Trading Pada Pasar Modal Di Indonesia. *Jurnal Cita Hukum* Vol. 3 No. 1
- Hariono, Wisnu Satrio. 2018. Perlindungan Hukum Bagi Investor Terhadap Kejahatan Insider Trading Dalam Pasar Modal Indonesia. *Jurnal Media Hukum dan Peradilan*, Volume 1 No 1
- Helmi Darmawan. 2018. Perlindungan Pemodal Akibat Insider Trading Pada Pasar Modal Di Indonesia Dalam Perspektif Hukum Islam. Skripsi Fakultas Syariah Universitas Islam Negeri Raden Intan Lampung
- Kitab Undang-Undang Hukum Acara Pidana R.I., Nomor 8 Tahun 1981, L.N.R.I Tahun 1981 Nomor 76.
- M. Satrika. 2011. Saham Menurut Perspektif Ekonomi Islam Dan Relevansinya Dalam Investasi Modern Indonesia. Skripsi Fakultas Syariah dan Ilmu Hukum Universitas Islam Negeri Sultan Syarif Kasim Riau Pekanbaru

- Mahrus Ali, Dasar-Dasar Hukum Pidana, Jakarta: 2015
- Mertokusumo, Sudikno. Mengenal Hukum Suatu Pengantar. Yogyakarta: Liberty, 2007.
- Mertokusumo, Sudikno. Penemuan Hukum Sebuah Pengantar. Yogyakarta: Liberty, 2014.
- Muliyanti, Susi.dkk. 2013. Analisis Yuridis Kedudukan Badan Pengawas Pasar Modal (BAPEPAM) Setelah Berlakunya Undang-Undang No. 21 Tahun 2011 Tentang Otoritas Jasa Keuangan. *USU Law Jurnal*. Vol. 2 No 2.
- Najib A. Gisymar. *Insider Trading dalam Transaksi Efek*. Bandung: Citra Aditya Bakti, 1999.
- Peraturan Otoritas Jasa Keuangan R.I., Nomor 22 Tahun 2019, Transaksi Efek, L.N.R.I Tahun 2019 Nomor 168.
- Peraturan Otoritas Jasa Keuangan R.I., Nomor 36/POJK.04/2018, Tata Cara Pemeriksaan Di Sektor Pasar Modal, L.N.R.I Nomor 261.
- Putusan Mahkamah Agung Nomor 1090/B/PK/PJK/2014.
- Radinda, FAM.dkk. 2020. Praktik *insider trading* sebagai bentuk pelanggaran prinsip keterbukaan informasi dalam pasar modal di Indonesia. *Jurnal Cakrawala Hukum*, 11(1),41-49. doi.10.26905/idjch.v11i1.3528.
- Romlah, Siti. Macan Ompong Regulasi Penyelesaian Kasus Insider Trading. 'Adalah' Buletin Hukum dan Keadilan Volume 1 No 1d tahun 2017
- Sunggono, Bambang. 2003. *Metodologi Penelitian Hukum*. Jakarta: Raja Grafindo Pustaka
- Suratman dan H. Philips Dillah, *Metode Penelitian Hukum*, Alfabeta, Bandung, 2013
- Undang-Undang R.I., Nomor 21 Tahun 2011, Otoritas Jasa Keuangan, L.N.R.I Tahun 2011 Nomor 111.
- Undang-Undang R.I., Nomor 8 Tahun 1995, Pasar Modal, L.N.R.I Tahun 1995 Nomor 64.
- Wiriadinata, Wahyu. 2014. Masalah Penyidik Dalam Tindak Pidana Jasa Keuangan. *Jurnal Hukum dan Pembangunan* Tahun ke-44 No. 1