

# Insider Trading and Money Laundering in the Perspective of Transnational Crime

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## Abstract

In this paper, the main topic concerns the arrangement of insider trading and money laundering in the perspective of transnational crime. The discussion uses the theory of legal protection which is divided into two: Preventive Legal Protection and Repressive Legal Protection. The study found that normatively, insider trading does not include other forms of money laundering crime as stipulated in Article 2 paragraph (1) of the Criminal Act of Money Laundering law (TPPU Law), but the article regulates one of the criminal acts in the Capital Market sector. Therefore, even though it is not explained in detail as a form of capital market crime, insider trading is one of the criminal acts in the capital market and categorized as predicate crime. Referring to the theory of legal protection, the application of POJK 12/POJK.01/2017, which is aimed at the activities of the financial services sector through risk-based approaches that adopt international standards as recommended by the Financial Action Task Force on Money Laundering (FATF), can be said to have a spirit of preventive legal protection. Furthermore, Law Number 8 of 2010 concerning Prevention and Eradication of Money Laundering Crimes, is more influenced by repressive legal protection.

**Keywords:** Insider Trading, Money Laundering, Transnational Crime

**DOI:** 10.7176/JLPG/89-08

**Publication date:** September 30<sup>th</sup> 2019

## 1. Background

A capital market is very fundamental in the economic development of a country. The capital market serves as a means to raise funds and allocate public funds for the benefit of the business world. Black's Law Dictionary defines capital markets as "*Financial markets in which long term securities are bought and sold*".<sup>5</sup> From this definition, it can be concluded that the definition of capital markets is a market or meeting place for sellers and buyers who trade long-term securities such as stocks and bonds.<sup>6</sup>

From the historical side, the development of capital markets in Indonesia is different from those in liberal capitalist countries. In liberal capitalist countries, capital markets develop evolutionarily while In Indonesia, capital market developments occur due to the existence of national development policies from the government. This can be seen from the objectives of establishing a capital market in Indonesia covering 3 basic aspects:

1. *To speed up the process of expanding community participation in the ownership of the company's shares;*
2. *To be directed on the aspect of community income distribution through equal distribution of company shares;*
3. *To encourage community participation in mobilizing and raising funds to be used productively.*<sup>7</sup>

In Indonesia, the capital market aims to support the implementation of national development in order to increase equity, growth and national economic stability towards improving people's welfare. To reach this goal, the capital market has a strategic role as one of the sources of financing for the business world, including small and medium businesses. On the other hand, the capital market is also an investment means for the community, including small and medium investors.<sup>8</sup>

This was confirmed in capital market policies as outlined in the 2015-2019 Indonesian Financial Services Sector Master Plan (*Master Plan Sektor Jasa Keuangan Indonesia - MPSJKI*). This 2015-2019 MPSJKI has been harmonized with the national economic development program launched by the Government through the National Long Term Development Plan 2005-2025 (*Rencana Pembangunan Jangka Panjang Nasional - RPJPN*) and the National Medium Term Development Plan 2015-2019 (*Rencana Pembangunan Jangka Menengah Nasional - RPJMN*). The direction of the development of the financial services sector is elaborated in initiative programs which are more detailed in the development roadmap in each of the financial services sectors including the capital market.

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<sup>5</sup> Henry Campbell, *Black's Law Dictionary (Sixth Edition)*, St. Paul Minn, West Publishing Co., 1990, p. 399.

<sup>6</sup> ELIPS, *Dictionary of ELIPS Economic Law (Kamus Hukum Ekonomi ELIPS)*, First Edition, ELIPS, Jakarta, 2000, p.20..

<sup>7</sup> Jasso Winarto, *Indonesian Capital Market, JSX Retropection of Five Years of Privatization (Pasar Modal Indonesia, Retropeksi Lima Tahun Swastanisasi BEJ)*, Pustaka Sinar Harapan, Jakarta, 1997, p 32.

<sup>8</sup> General explanation of Law Number 8 of 1995 concerning Capital Market.

Capital market development in Indonesia, based on the release of the Indonesia Stock Exchange (IDX) as conveyed by Tito Sulistio President Director of IDX, in the value of share ownership by foreign investors up to December 2017 reached Rp. 1,878 trillion and this increased quite sharply compared to Rp. 1,691 trillion in 2016.<sup>1</sup> In terms of transaction value, 40% of share transactions in the capital market are controlled by foreign investors.<sup>2</sup> By looking at the huge investment structure of foreign investors and the increasing capitalization value, it is likely to have a positive impact on development in Indonesia.

However, in another perspective, the impact of the magnitude of transactions by foreign investors shows that the financial fundamentals in the capital market are still supported by foreign investors even though the percentage is not dominant. This has the potential to affect the investment climate in the Indonesian capital market if foreign investors divert their investment in other countries.

In some countries, the capital market is a measure of the economy of a country, it requires strict legal arrangements and encourages the behavior of professional capital market players. For this reason, a strong commitment is needed to apply the basic principles of capital market development.

In the capital market, the main principle is known as Disclosure Principle, where every capital market actor applies the principle of corporate information management, especially to public companies or issuers in the capital market, who have the obligation to implement the disclosure principle and the Materiality Principle.

The disclosure principle as the main principle in the capital market aims to protect the public interest. The players in the capital market must disclose the existence of violations, negligence, unusual conditions in corporate documents, information or other materiality facts that can pose a risk to the company. While the Materiality Principle is information or materiality facts that are relevant regarding events, occurrences, or facts that can affect the condition of the company.

For this reason, information in the capital market is important, the actors of the capital market are also required to hold the Prudential Principle in the sense of the truth and accuracy of information. The precautionary principle is needed to avoid claims from investors based on the disclosure of misleading statements, omission, and misrepresentation.<sup>3</sup>

Information in the capital market plays a very important role, it is often revealed in various financial scandals also emerged in the midst of the growth of the capital market. In contrast to other forms of crime, the forms of capital market crime are more typical such as market manipulation, insider trading, and fraudulent practices. The perpetrators are the parties who commit violations or crimes in the capital market in which they occupy strategic positions in companies such as directors, commissioners, and other manager-level officials. Besides that, professionals such as brokers, investment advisors, accountants, legal consultants, and appraisers can be the perpetrators.

The complexity of insider trading disclosure in the capital market involving various parties, especially in the practice of insider trading involving foreign parties also has the potential to become a planned crime and detrimental to minority shareholders and investors or prospective domestic investors. For this reason, the relevant issue to be discussed is: **What are the regulations for insider trading and money laundering in a transnational crime perspective?**

## 2. Discussion

Business development and globalization, on the one hand, have a positive effect in the term of efficiency but on the other hand, they have a negative impact with the emergence of several new criminal acts such as insider trading which is a typical crime in the capital market. Besides that, there is also an increasingly widespread effort to hide wealth or better known as money laundering, which in Indonesia is known as the Criminal Act of Money Laundering (Tindak Pidana Pencucian Uang - TPPU). In addition, the flow of globalization also has an impact on the mode of crime that has crossed national borders in line with the depletion of national borders, especially in the investment sector. Moreover, the rapid capital flows from one country to another in the capital market makes it increasingly difficult to detect and resolve transnational crimes. Various efforts have been made by the government to deal with and eliminate transnational crime through ratification and enforcement of legislation in Indonesia.

### 2.1. Insider Trading

As mentioned earlier, information disclosure aside from being a key principle in the capital market, it is also fundamental for investors in the capital market. In each transaction, information disclosure is used as a reference for investors in making decisions to invest their capital in the capital market. Stock price fluctuations will be

<sup>1</sup> Accessed from [Republika.co.id](http://Republika.co.id), Foreign Investor Shares on IDX Reach Rp. 1,878 Trillion, December 9, 2018.

<sup>2</sup> Accessed from [Liputan6.com](http://Liputan6.com), 40 Percent of Foreign Investors Control Shares Transactions in the Indonesian Capital Market, December 9, 2018.

<sup>3</sup> Sitompul, Asril, Zulkarnaun Sitompul, Bismar Nasution, Insider Trading, Crime in the Capital Market (Insider Trading, Kejahatan Di Pasar Modal), Books Terrace & Library, Bandung, 2007, p. 11.

corrected, so the value per share will increase if there is positive material information about the stock, and will decline with negative material information. The point is theoretically, the trend of stock prices can fluctuate if there is really significant information for certain stocks.

Crimes in the capital market sector are typical crimes committed by capital market players with the modus operandi that is not much different from the capital markets of other countries. Crime in the capital market is one of the most sophisticated crimes in the world which is generally complicated and not easily traceable. One of them is insider trading, in addition to its sophisticated modus operandi, capital market criminals generally consist of educated people so that it can be said that capital market crimes belong to the white-collar crime. Capital market crime is difficult to be proven especially if law enforcement still uses conventional methods of law enforcement.<sup>1</sup>

The practice of insider trading is a transaction carried out using non-public information). Bismar Nasution described insider trading as follows:

*“The practice of insider trading occurs when insider companies trade using information that has not been disclosed. In this case, insiders have information that contains material facts that can affect stock prices. This information advantages in stock trading can, therefore, create unfair shares. Given that insider trading is a practice carried out by the corporate insider who conducts stock trading by using information that contains material facts owned while the information is not yet available to the public (inside non-public information).”*<sup>2</sup>

Because information can affect stock prices, each party that uses inside non-public information for the purpose of conducting transactions in securities trading is violating Law Number 8 of 1995 concerning the Capital Market (*Undang-undang Pasar Modal - UUPM*). The practice of insider trading is used by people who are highly skilled and experienced in securities transactions, which are carried out with in-depth calculations, careful and accurate analysis and using inside information that will generate enormous profits in securities transactions.

Some of the theories underlying the first insider trading arrangement are the fiduciary obligation theory. The construction of the law from the fiduciary obligation theory determines that the commissioners, directors, major shareholders, and employees of the company are insiders. Insiders have an obligation to hold a fiduciary obligation to companies to always protect every company's information and they have the most sensitive company information. Before the company publishes information material required based on regulations in the capital market, all insiders are required to maintain their confidentiality. This doctrine adopts a concept that exists in common law countries where the notion of fiduciary obligation is trust or confidence. By only adhering to the theory of fiduciary obligation, there are obstacles in its application. There are parties that are not bound by the fiduciary obligation but they have non-public information material and use it to carry out transactions. Those parties are not bound by legal responsibility. This was stated by Bismar Nasution as follows:

*“The classic theory of insider trading determines that the infringement in insider trading is based on the relationship of the Parties in the transaction or those who have a fiduciary obligation. When the classic theory of insider trading is employed to solve the problem of insider trading, a person who has no fiduciary obligation but trades stocks using non-public information material is not considered to be insider trading perpetrator. As a result of this theory, the objective of insider trading regulation to be a form of protection to investors will not be maximized because the classic theory that fiduciary obligation based provides an opportunity to a party who has no fiduciary obligation to conduct insider trading. For example, if a tippee obtains factual information material from the insider and the tippee does not have the fiduciary obligation, then the tippee cannot be held liable”.*<sup>3</sup>

For this reason, an analysis is made to expand the concept of fiduciary obligation not only for each party legally bound by the company but also on parties outside the company that has a working relationship in a certain or incidental time. This view adopted the misappropriation doctrine in the provisions of the prohibition of insider trading. The rules regarding the prohibition of insider trading are regulated in Article 95 through Article 98 of Law No. 8 of 1995 concerning the Capital Market, but this provision is very limited and only reaches certain parties who have a fiduciary obligation to the recipients of information (tippee), the provisions concerning the expansion of the notion of insider trading based on the misappropriation theory are not regulated at all.<sup>4</sup>

<sup>1</sup> Munir Fuady, *Dirty Business Anatomy of White Collar Crime (Bisnis Kotor Anatomi Kejahatan Kerah Putih)*, Citra Aditya Bakti, Bandung, 2004, p. 118.

<sup>2</sup> Bismar Nasution, *The discourse of Public Lecture on Capital Market Law 2: Capital Market Law in Stock Trading, Master of Law Program, Faculty of Law, University of Pancasila, Jakarta, 2001, p. 30-31.*

<sup>3</sup> Bismar Nasution, op.cit., p.25.

<sup>4</sup> Donald Moody Pangemanan, *Insider Trading Regulations in the Indonesian Capital Market: A Study of the Application of Insider Trading Abuse (Theory Peraturan Insider Trading Dalam Pasar Modal Indonesia: Studi Mengenai Penerapan Teori Penyalahgunaan Dalam Praktek Insider Trading)*, in the *Law & Capital Market Journal, Capital Market Legal Consultants Association (Himpunan Konsultan Hukum Pasar Modal - HKHPM) 2nd Edition / July 2005, Jakarta 65.*

A slightly different view related to the regulation of the prohibition of insider trading based on the misappropriation theory, Bismar Nasution stated that "The Indonesian Capital Market Law regulates the provisions of insider category outside the traditional insiders, such as temporary insider-quasi insider.<sup>1</sup> However, the Capital Market Law does not regulate the provisions of "Other Parties" who do not receive the information from insiders but from other tippees (secondary tippee). The absence of the regulation for secondary tippee as an insider indicates that the Indonesian Capital Market Law in regulating insider categories is still lacking and has not thoroughly applied insider trading legal liability derived from the misappropriation theory. The application of misappropriation theory needs to be regulated in the field of capital markets within the framework of providing legal protection to investors and as an effort to be able to adjudge insider trading actors even without fiduciary obligation.

## 2.2. Concept and Regulation of Money Laundering Crimes in Indonesia

Criminals in the capital market sector always try to save the proceeds of crime. One way that can be done is with money laundering. By money laundering, the perpetrators try to change the illegally obtained assets to become legal.

The definition of money laundering based on Black's Law Dictionary is "Term used to describe investment or other transfer of money flowing from racketeering, drug transactions, and other illegal sources into legitimate channels so that its original source can not be traced."<sup>2</sup> From the definition, it means that through money laundering activities, the perpetrators of crimes try to hide or obscure the true origin of the wealth or the proceeds of crime and use it as if the result of a legitimate business, and subsequently, the so-called legitimate business is developed to commit more crimes.

Whereas Sutan Remy Sjahdeni defines money laundering as a series of activities carried out by a person or organization concerning illicit money obtained from crime with the intention of hiding or disguising the origin of the money from the government or the authorized authority by mainly putting the money into the financial system so that the money is then released from the financial system as legal money.<sup>3</sup>

Furthermore, The Financial Action Task Force on Money Laundering (FATF) defines money laundering "as the processing of criminal proceeds to disguise their illegal origin in order to legitimise the ill-gotten gains of crime." From the FATF definition, it can be concluded that money laundering is an attempt to conceal or disguise the origin of wealth with various transactions so that it is regarded as legally obtained.<sup>4</sup>

There are many factors driving the proliferation of money laundering activities in various countries including the:

1. Globalization
2. Rapid technological progress especially advances in information technology. With these developments, the borders of the State have become meaningless, the world has become an unlimited entity.
3. Very strict bank secret provisions from the country concerned;
4. The possibility of anonymous bank account, for example in the State of Austria.
5. The emergence of a new type of money called electronic money or e-commerce via the internet. Money laundering is done using an internet network called cyberspace or cyberlaundering.
6. Money laundering is possible by using the layering method. In this way, the depositors at the bank are not the real owners of the money. The depositor only acts as the executor of the party responsible for depositing the money in the bank.
7. The validity of the legal provisions pertains to the confidentiality of the relationship between lawyers and their clients, and between accountants and their clients. According to the law in most developed countries, the confidentiality of the relationship between the client and the lawyer is protected by law.
8. The government of the country concerned never intended to seriously eradicate the practice of money laundering carried out through the banking system in that country.
9. money laundering is not considered as a crime in the country concerned, in other words, the country concerned does not have a law on eradicating money laundering crimes.<sup>5</sup>

The main problem, therefore, is discussed whether insider trading can be categorized into criminal offense if the proceeds of insider trading crimes are followed by money laundering. Normatively the crime of money

<sup>1</sup> Bismar Nasution, Op.cit.

<sup>2</sup> Henry Campbell, *Black's Law Dictionary (Sixth Edition)*, St. Paul Minn, West Publishing Co., 1990, p. 884.

<sup>3</sup> Sutan Remy Sjahdeini, *Money Laundering: Definition, History, Cause Factors, and Impacts on Society (Pencucian Uang: Pengertian, Sejarah, Faktor-Faktor Penyebab, dan Dampaknya bagi Masyarakat)*, in the *Business Law Journal Vol. 22 No. 3, Business Legal Development Foundation*, 2003, p. 3.

<sup>4</sup> Yudi Kristiana, *Eradication of Money Laundering in Progressive Legal Perspective (Pemberantasan Tindak Pidana Pencucian Uang Perspektif Hukum Progresif)*, p. 18.

<sup>5</sup> Sutan Remy Sjahdeini, *Money Laundering: Definition, History, Cause Factors, and Impacts on Society (Pencucian Uang: Pengertian, Sejarah, Faktor-Faktor Penyebab, dan Dampaknya bagi Masyarakat)*, in the *Business Law Journal Vol. 22 No. 3, Business Legal Development Foundation*, 2003, p. 12.

laundering in Indonesia is regulated in Law Number 8 of 2010 concerning Prevention and Eradication of Money Laundering (TPPU Law). In the TPPU Law, insider trading is not included in the types of money laundering crimes in Article 2 paragraph (1), but the provision of Article 2 paragraph (1) of TPPU mentions that proceeds of crime are one of them in the Capital Market sector. Thus, even though Article 2 paragraph (1) does not explain in detail the form of capital market crime, in our opinion insider trading is one of the criminal acts in the capital market, thus it is a predicate crime.

### 2.3. Transnational crime

The development of globalization creates an interdependence of a country, where on the one hand the economy of a country has a positive impact by giving forth to prosperity and progress of civilization, on the other hand, it also has negative consequences including the development of transboundary crime in all parts of the world. The rapid progress of science, technology, and communication seems to obscure the borders of the country giving the increasingly easy access for people, goods, and services from one country to another. Globalization is a new economic model movement that is characterized by neoliberalism driven by and for the benefit of developed countries. Globalization as an economic concept encourages countries to integrate their economy into a single or global economic pattern. The doctrine of globalization includes trade liberalization, financial flows, deregulation of products, capital and the labor market, and streamlining the role of the state, especially those relating to social and economic development programs.

Globalization also changes the characteristics of crimes that originally within a country into cross-national or transnational. Transnational crime is a form of crime that can threaten social, economic, political, security and even threaten human life. Nowadays transnational crime has developed into organized crime, it can be seen from the scope, character, modus operandi and perpetrators of the crime.<sup>1</sup>

Money laundering is one of the crimes committed in which the perpetrators hide the proceeds of crime to avoid being traced by law enforcement officials and to make the money seemed to come from legal business and not related to predicate crime. The predicate crime is usually a transnational crime, such as drug trafficking, human trafficking, corruption, and arms trafficking. Most money laundering crimes are carried out by groups of business crimes who are members of crime syndicates. Money laundering is carried out by groups of transnational criminals that are very detrimental to many countries because it has a global impact on macroeconomic developments which can result in the loss of trust between the countries related due to its connection with money laundering activities. Money laundering is included as a transnational crime because this crime does not only involve one citizen of a country, but more than a few countries. It has ways and means to commit crimes beyond the borders of other countries. Besides that, as transnational crime, money laundering tends to be a form of organized transnational crime, involving crime groups spread across various countries.

In relation to transnational crime, the United Nations (UN) has ratified The United Nations Convention against Transnational Organized Crime (UNTOC). This Convention has 3 (three) protocols, they are:

1. *Protocol against the Smuggling of Migrants by Land Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime;*
2. *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;*
3. *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing United Nations Convention against Transnational Organized Crime.*

Meanwhile, at the regional level, ASEAN countries have agreed to a declaration on the Eradication of Transnational Crime in the form of a special forum to discuss transnational crime, namely the ASEAN Ministerial Meeting on Transnational Meeting on Transnational Crime (AMMTC). ASEAN approved eight types of transnational crimes discussed in the AMMTC forum, they are: *terrorism, money laundering, drug trafficking, arm smuggling, sea piracy, cyber crime, trafficking in person (especially women and children), and international economic crime.*<sup>2</sup>

In conducting a study on money laundering crime, this discussion cannot be separated from various international instruments which have important contributions to eradicate money laundering. The international conventions are:

1. *Convention against illicit traffic in Narcotic Drug and Psychotropic Substance 1988, (UN Drug Convention 1988)* that discussed the money laundering crime in article 3 sub b (i) and (1) as follows:  
(i) *The conversion or transfer of property; knowing that such of property is derived from any offence or offence establish in accordance with subparagraph (a) of his paragraph, of from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit*

<sup>1</sup> General Law Number 5 of 2009 on the ratification of United Nation Convention Against Transnational Organized.

<sup>2</sup> Dikutip dari Mahmud Syaltout, *Final Report of the Legal Compendium on International Cooperation in the Field of Law Enforcement (Laporan Akhir Kompendium Hukum Tentang Kerjasama Internasional Di Bidang Penegakan Hukum)*, Agency of National Law Development; Ministry of Law and Human Rights, Republic of Indonesia, Jakarta, 2012, p. 48

*origin or the property of the property or of assisting any person who is involve in the commission of such an offences to evade the legal consequences of his action:*

- (ii) *The concealment or disguise of the true nature, source, location, disposition, movement, right with respect to, or ownership of property, knowing that such property is derived from an offence or offences establish in accordance with subparagraph (a) of this or from an act of participation in such offence of offence.*

This provision is intended to eradicate money laundering from the proceeds of illicit drug trafficking for law enforcement officials to be able to trace the results of drug crimes as the predicate crime. The meaning of money laundering crime as referred to in the UN Drug Convention 1988 from the above two definitions can be concluded that money laundering is an attempt or process to change the status of money assets obtained from a predicate crime and manipulate it into a property that seems legal.<sup>1</sup>

2. *Convention against Transnational Organized Crime (Palermo Convention) 2000.*

In this 2000 convention on transnational organized crime, it was emphasized that money laundering is an organized form of transnational crime. Underlying these provisions, money laundering is one form of organized transnational crime, in addition to other crimes in the scope of the application of the Palermo 2000 Convention. Furthermore, the definition of money laundering mentioned in article 6 paragraph (1) is formulated as follows:

*Each State Party shall adopt, in accordance with fundamental principle of its domestic law, such legislative and other measures as may be necessary to establish as criminal offence, when committed internationally:*

- (a) (i) *The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any persons who is involved in the commission of the predicate offence to evade the legal consequences of his or her action.*  
(ii) *the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceed of crime;*  
(b) (i) *The acquisition, possession or use of property, knowing at time of receipt knowing that such property is the proceeds of crime;*  
(ii) *Participation in, association with or conspiracy to commit, attempt to commit and aiding abetting, facilitating and counselling the commission of any of the offences established in accordance with the article.*

The Convention on Transnational Organized Crime 2000 required every participant country to take action against money laundering crimes in its national criminal law.

In addition to the conventions referred to earlier, in the face of legal issues, eradicating money laundering can be implemented through Multilateral International Cooperation with more than two parties or countries that become participants and not limited to certain areas. This cooperation is open to countries that have not been in the negotiation or part of the negotiations by agreeing to the consent to be bound. Because the Disclosure Law and Legal is universal and does not only include countries involved in the negotiation process.

Indonesia has joined some multilateral cooperation as an effort to fight money laundering activities and it is also carried out by countries that are members of the G-7. The G-7 Summit held in July 1989 in France has formed a unit a task called the Financial Action Task Force (FATF). For the Asia Pacific region, the Asia Pacific Group on Money Laundering (APG) was also formed, it is an international organization in the development of anti-money laundering regimes whose members are spread in South Asia, Southeast Asia, and East Asia and the South Pacific.<sup>2</sup> One of the roles of FAFT is to establish policies and steps needed in the form of recommendations for actions to prevent and eradicate money laundering. So far, FAFT has issued 40 (forty) recommendations related to Money Laundering and 9 (nine) specific recommendations related to terrorism funding.<sup>3</sup>

### 3. Application of the Anti Money Laundering Program in the Capital Market

The function of the Financial Services Authority is to establish an integrated regulatory and supervisory system for all activities in the financial services sector, including the capital market by administering the Financial Services Authority Regulation Number 12/POJK.01/2017 concerning the Application of Anti Money Laundering and Prevention of Terrorism Funding Programs in Financial Services Sector ("POJK 12/POJK.01/2017"). This POJK 12/POJK.01/2017 replaced the Financial Services Authority Regulation Number 22/POJK.04/2014 concerning Know-Your-Customer Principles of Financial Service Providers Principles in the Capital Market Sector, State Gazette of the Republic of Indonesia Number 353 of 2014, Supplement to the State Gazette of the

<sup>1</sup> Mahmud Syaltout, Op.Cit, p, 67.

<sup>2</sup> Attachment Guidelines to Decision of the Head of the Financial Transaction Reports and Analysis Center No. 2/1/Kep/PPATK/2003 concerning General Guidelines for Prevention and Eradication of Money Laundering Crime for Financial Service Providers.

<sup>3</sup> Ibid

Republic of Indonesia Number 5631 revoked and declared invalid ("POJK 22/POJK.04/2014").

The main principle of 22/POJK.04/2014, Know-Your-Customer Principles that is applied by Financial Service Providers in the Capital Market sector, is deemed to be out of date and is not sufficient to be applied in the current global economic era. The core of the Know-Your-Customer Principles that must be applied by Financial Service Providers includes Securities Companies that conduct business activities as Underwriters, Brokers, and/or Investment Managers, as well as Commercial Banks that carry out Custodian functions to:

- a. *Monitor Customers' securities accounts and transactions;*
- b. *Report any Suspicious Financial Transactions and cash transactions,*  
*in accordance with the law and regulations in the Capital Markets sector and laws and regulations associated with the prevention and eradication of money laundering offenses and/or the prevention and eradication of terrorism funding.*<sup>1</sup>

While the background of the regulation of POJK 12/POJK.01/2017 is more influenced by the development and flow of globalization in the financial services sector accompanied by the development of financial services products including marketing (multi-channel marketing), conglomerates, and industrial technology and activities, that potentially increasing risk of utilizing the financial services industry as a means of Money Laundering and/or Terrorism Funding with the increasingly diverse and advanced modus operandi.

The application of POJK 12/POJK.01/2017 is aimed at financial service sector activities through risk-based approach by adopting international standards as recommended by the Financial Action Task Force on Money Laundering (FATF) which confirms that in implementing the regime of anti-Money Laundering and prevention of Terrorism Funding, a risk-based approach in the preparation of policies and procedures is needed to put forward.

By studying the two POJKs, it appears that there are differences in principles where POJK 22/POJK.04/2014 regulates the principles of knowing your customer while POJK 12/POJK.01/2017 is more oriented towards financial service sector activities through a risk-based approach. POJK 12/POJK.01/2017 focuses more on risk mitigation which is the burden and responsibility of Financial Service Providers. Another difference is that POJK 22/POJK.04/2014 does not regulate about the obligation of Financial Service Providers to check on Walk-in Customer while in POJK 12/POJK.01/2017 Financial Service Providers are obliged to conduct Walk-in Customer checks. Walk-in Customer is:

*.. " the party that uses Financial Services Provider services in the Banking Sector or Financial Services Provider in the Capital Market sector but does not have an account in the Financial Services Provider in the Banking Sector or the Financial Services Provider in the Capital Market sector, it does not include the party who obtains an order or assignment from the Customer to conduct transactions on behalf of the Customer."*<sup>2</sup>

Through the implementation of the Anti-Money Laundering Program with international standards in the financial services sector, it is expected that Financial Service Providers can conduct their activities in a healthier and more globally competitive manner so that they will encourage the growth of the financial services industry nationally as that the recommendations of the Financial Action Task Force on Money Laundering (FATF) are standards for the prevention and eradication of Money Laundering and/or Terrorism Funding. In the perspective of regulation in the capital market, the framework of the POJK 12/POJK.01/ 2017 has referred to FAFT Recommendations. However, the implementation, as contained in the Indonesia Mutual Evaluation Report in September 2018, has not been optimal, especially those relating to *assessing risk and applying a risk-based approach, national cooperation and coordination, money laundering offence, customer due diligence, record-keeping, transparency and beneficial ownership of legal person and legal arrangement, regulation and supervision of financial institution, financial intelligence units.*<sup>3</sup>

In the final part of the discussion on concepts, theories, and regulations, especially those relating to the crime of money laundering in the capital market, they will be studied more deeply using the Theory of Legal Protection. The Theory of Legal Protection departs from basic rights i.e freedom, the fundamental right, and the right to be protected. In essence, every individual who carries out a social contract respects freedom with the limitation of the fundamental right and protection of ownership of property.

To protect human rights then the legal protection of society is left to the rulers granted through social contracts. The concept of legal protection for people in Western countries comes from the concepts of *Rechtsstaat* and the Rule of the Law. Legal Protection is an effort to protect the subjects of law through applicable laws and is divided into two:

<sup>1</sup> Article 1 paragraph (5) of Financial Services Authority Regulation Number 22/POJK.04/2014 concerning Know-Your-Customer Principles of Financial Service Providers Principles in the Capital Market Sector, State Gazette of the Republic of Indonesia Number 353 of 2014, Supplement to the State Gazette of the Republic of Indonesia Number 5631.

<sup>2</sup> Article 1 (10) of Financial Services Authority Regulation Number 12/POJK.01/2017 concerning Application of Anti-Money Laundering and Prevention of Terrorism Funding Programs in the Financial Services Sector. State Gazette of the Republic of Indonesia of 2017 Number 57, Supplement to the State Gazette of the Republic of Indonesia Number 6035.

<sup>3</sup> Asia Pacific Group on Money Laundering, *Anti-money laundering and counter-terrorist financing measures Indonesia*, Mutual Evaluation Report, Third Round Mutual Evaluation Report, Sydney, 2018, p. 287-190.

- a. **Preventive Legal Protection**, is protection provided by the government with the aim of preventing the occurrence of violations. This is contained in legislation with the aim of preventing and providing signs or limitations in carrying out an obligation;
- b. **Repressive Legal Protection**, is the protection in the form of giving sanctions i.e fines, imprisonment, and additional penalties if a dispute has occurred or an offense has been committed.<sup>1</sup>

Referring to the theory of legal protection, the application of POJK 12/POJK.01/2017, which is aimed at the activities of the financial services sector through risk-based approaches that adopt international standards as recommended by the Financial Action Task Force on Money Laundering (FATF), can be said to have a spirit of preventive legal protection. This view is based on the idea that protection is provided by the government with the aim of preventing the occurrence of violations. This is contained in legislation with the aim of preventing and providing signs or limitations in carrying out an obligation for capital market players.

Furthermore, Law Number 8 of 2010 concerning Prevention and Eradication of Money Laundering Crimes, is more influenced by repressive legal protection. It is legislation that provides legal protection in the form of sanctions i.e fines, imprisonment, and additional punishment if a violation or crime has occurred.

### Closing

From the previous discussion relating to the arrangement of insider trading and money laundering in the perspective of transnational crime, some conclusions that can be drawn are:

1. The prohibition of insider trading as stipulated in articles 95 through article 98 of Law No. 8 of 1995 concerning the Capital Market, is still very limited and only reaches certain parties who have a fiduciary obligation to the recipient of information (tippee). For this reason, there should be an effort to expand the concept of fiduciary obligation not only for every party legally bound by the company but also for parties outside the company that have a working relationship in a certain or incidental time. This view adopted the misappropriation doctrine in the provisions of the prohibition of insider trading. The view of the misappropriation theory is intended to regulate the provisions of insider category outside traditional insiders, such as temporary insider-quasi insider category or also another tippee (secondary tippee) as an insider category.
2. Normally insider trading does not include as money laundering crime as stipulated in Article 2 paragraph (1) of the TPPU Law, but the article regulates the proceeds of a criminal act, one of which is in the Capital Market. Thus, even though Article 2 paragraph (1) does not explain in detail the form of capital market crime, insider trading is one of the criminal acts in the capital market, it can be categorized as predicate crime.
3. Indonesia has joined some multilateral cooperation as an effort to fight money laundering activities and it is also carried out by countries that are members of the G-7. The G-7 Summit held in July 1989 in France has formed a unit a task called the Financial Action Task Force (FATF). For the Asia Pacific region, the Asia Pacific Group on Money Laundering (APG) was also formed, it is an international organization in the development of anti-money laundering regimes whose members are spread in South Asia, Southeast Asia, and East Asia and the South Pacific.<sup>2</sup> One of the roles of FAFT is to establish policies and steps needed in the form of recommendations for actions to prevent and eradicate money laundering. So far, the implementation, as contained in the Indonesia Mutual Evaluation Report in September 2018, has not been optimal.
4. Referring to the theory of legal protection, the application of POJK 12/POJK.01/2017, which is aimed at the activities of the financial services sector through risk-based approaches that adopt international standards as recommended by the Financial Action Task Force on Money Laundering (FATF), can be said to have a spirit of preventive legal protection. Furthermore, Law Number 8 of 2010 concerning Prevention and Eradication of Money Laundering Crimes, is more influenced by repressive legal protection. It is legislation that provides legal protection in the form of sanctions i.e fines, imprisonment, and additional punishment if a violation or crime has occurred.

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<sup>1</sup> Muchsin, *Legal Protection and Certainty for Investors in Indonesia (Perlindungan dan Kepastian Hukum bagi Investor di Indonesia)*, Master in Law, Postgraduate Program at Sebelas Maret University, 2003, p. 20.

<sup>2</sup> Attachment Guidelines to Decision of the Head of the Financial Transaction Reports and Analysis Center No. 2/1/Kep/PPATK/2003 concerning General Guidelines for Prevention and Eradication of Money Laundering Crime for Financial Service Providers.



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