

COMPARATIVE LEGAL ANALYSIS ON THE COMPETENCE OF THE INDONESIA'S FINANCIAL SERVICES AUTHORITY AND MONETARY AUTHORITY OF SINGAPORE ON THE ENFORCEMENT OF INSIDER TRADING LAWS

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Abstract

This article investigates the competencies of both Indonesian and Singaporean capital market supervisory and regulatory bodies, namely *Otoritas Jasa Keuangan* and the Monetary Authority of Singapore. It further assesses the effectiveness of each body in enforcing laws prohibiting insider trading specifically. It shall further evaluate the passiveness portrayed by the Indonesian counterpart when it comes to the eradication of day trading activities in the market as well as variables that are weighed in its implementation. A normative-empirical method is used for this article as it considers legal principles and legal systems, following a comparative approach. The materials relied on for this article include an interview with a capital market lawyer, an analysis of the law and other supporting documents, and a comparative study. The nature of competence for Indonesia and Singapore's capital market supervisory and regulatory bodies is quite similar which adopt integrated approaches towards regulation and supervision of the capital market and with adequate authority to enforce their mandates. Since 2012, OJK has replaces the role of *Bapepam-LK* to administer the Capital Market Law as an independent body. OJK is responsible for enacting rules and other oversight of the sector.

Keywords: *Comparative, Insider Trading, Law Enforcement*

I. INTRODUCTION

Investment has drawn interest across generations. This draw to investment has enveloped all countries, including Southeast Asian countries like Indonesia and Singapore. Singapore has been long known as one of Asia's economic powerhouses as it holds a position as one of the largest economic hubs in Asia and even the world. On the other hand, Indonesia has gone through major economic developments over the past years and is recognized as a rapidly growing economy and a member of the G-20. This gives rise to the notion that both Indonesians and Singaporeans have purchasing power with the potential of idle funds stored financially.

Investment is a way to generate gains from otherwise idle resources. There are numerous ways for one to invest their money and it depends on each person's preference. Nowadays, investment instruments vary from foreign exchange, equity investments, property holdings, and even cryptocurrencies. However, the capital market has been one of the most prominent and long-used platforms used by the public to invest in shares, bonds, and other financial products that the market offers. In Indonesia, the capital market has been around since 1912 during the Dutch colonization era and has continued to exist until now. As of today, the Indonesian capital market is operated by *Bursa Efek Indonesia* ("BEI") as the stock exchange platform and is overseen by *Otoritas Jasa Keuangan* ("OJK") as the capital market regulatory and supervisory body. It operates as mandated by the Law Number 8 of 1995 pertaining to Capital Markets ("Capital Markets Law") as the prevailing law.

OJK was established through the enactment of Law Number 21 of 2011 regarding *Otoritas Jasa Keuangan* ("OJK Law") with its main objective to form a comprehensive regulatory framework and a supervisory body of the financial services sector to create a developed, stable, and sustainable national economy. Touching all vital economic sectors in Indonesia, the OJK serves as a regulatory and supervisory body for the banking and financial services sector with the goal to create an integrated and comprehensive system because the sector is deemed vital for the development of the national economy. The financial sector has gone through various changes which resulted in a complex, dynamic, and interconnected system equipped with advanced technology. Hence the establishment of OJK is expected to accommodate the ever-evolving market. Regulatory and supervisory institutions are vital for the country as it fosters a healthy financial system providing a safe platform for consumers; OJK was established to meet those expectations.¹

Similarly, Singapore has the Monetary Authority of Singapore ("MAS"), established in 1971 following the enactment of the Monetary Authority of Singapore Act ("MAS Act"). In general, MAS holds the authority to regulate the financial services sector in Singapore. The MAS acts as Singapore's central bank as well as financial regulator, with the authority to issue monetary policies and with other macroeconomic supervisory duties. In its position as integrated financial supervisor, the MAS oversees all financial institutions in Singapore including banks, insurers, capital market intermediaries, financial advisors as well as stock exchanges. Its goal is for Singapore to be promoted as a dynamic financial center by providing a prudent and sustainable financial system.²

¹ N. F. Diba, H. S. Disemadi, and P. Prananingtyas, "Kebijakan Tata Kelola Otoritas Jasa Keuangan (OJK) di Indonesia," *Ekspose: Jurnal Penelitian Hukum dan Pendidikan*, vol. 18, no. 2 (2020), doi: 10.30863/ekspose.v18i2.485.

² Monetary Authority of Singapore, "Who We Are," *MAS*, accessed on 7 February 2022, <https://www.mas.gov.sg/who-we-are>.

All laws and regulations that have been promulgated by the government in the field of capital market signifying an effort to protect investors. In essence, investors are the consumer of the capital market, and there is an obligation to protect consumer rights through the adoption of UN Guidelines for Consumer Protection.³ Moreover, the protection of investors is important as they are the life of the capital market, meaning that the existence of a capital market lies with them. To function fully, capital markets require investors so protection of their legal rights is a must. Because any form of investment is risky, there is a huge potential for investors to suffer losses. As such, the existence of sufficient regulation and oversight of the market can create a safety net for investors. In circumstances where the capital market can guarantee protection for its investors, the public's trust is built as a safe space for investment which leads to national economic development. An investment-friendly country can have a fair, orderly, accountable, and sustainable capital market, able to protect investors from any kinds of fraud and other illegal trading activities.

Unlawful trading activities themselves may come in various forms and insider trading is one of them. In Indonesia insider trading is specifically proscribed under Articles 95 to Article 99 of the Capital Markets Law. Under these provision, insider trading is defined as trading securities involving an insider of a public company by providing insider information allowing him/herself or another person to engage in profiting from the purchase and/or sale of securities. In this sense, the employee has some sort of material information that may be crucial to the share price of that particular company.

The threshold for an activity to be deemed insider trading has been set. However there lies a certain degree of complexity for authorities to be able to prove the conduct of insider trading. Insider trading is by nature ambiguous and proving culpability is especially difficult due to the use of advanced technology in the financial services sector.⁴ Herein, the burden of proof lies with the investigators to strictly detect suspicious transactions and act upon them. The key to eradicating insider trading is the commitment from the authorities and its intensity in enforcing the laws and conducting thorough investigations of companies and investors whether being big institutional investors or smaller retail investors.

Indonesia operates its capital market activities based on the Capital Markets Law, while Singapore has enacted Securities and Futures Act ("SFA"). Both countries have similarly prohibited the practice of insider trading. However, in 2012, an insider trading case occurred concerning one of the listed companies

³ Hamzah and A. Ahmad, "Capital market products and investor protection," *European Research Studies Journal*, vol. 21, no. 2 (2018), doi: 10.35808/ersj/1035.

⁴ L. Biggerstaff, D. Cicero, and M. B. Wintoki, "Insider trading patterns," *Journal of Corporate Finance*, vol. 64 (2020), doi: 10.1016/j.jcorpfin.2020.101654.

in Indonesia, PT Bank Danamon Tbk (“BDMN”). The case involved Rajiv Louis, former head of UBS Indonesia who was suspected to have conducted insider trading. Rajiv Louis took advantage of insider information regarding DBS Group’s plan to acquire a majority interest in BDMN stock. In March 2012, he bought 1 million BDMN shares through his wife’s account listed in Singapore.

The outcome of this case and other insider trading cases in Indonesia has sparked public opinion that OJK has not been very committed to investigating insider trading allegation, although they are the assigned authorities to carry out such mandate.⁵ As previously mentioned, the protection of investors is a key in maintaining a healthy capital market. However, tracing back in its enforcement record, most insider trading in Indonesia have ended up in administrative sanctions whereas Capital Market Law specifically prescribes the practice as a crime. In this sense, public investors and the market have suffered while the perpetrators only get a slap on the wrist.

With that being said, this article discusses two issues: what the nature of competence of the capital market regulatory and supervisory bodies in Indonesia and Singapore is and how the enforcement of insider trading dealt with by Indonesian and Singaporean authorities during the acquisition of PT Bank Danamon Indonesia Tbk by OJK and MAS is.

This article utilizes a normative-empirical method to further examine the implementation of the prevailing rules that have been enacted, and how they set guidelines for any parties in the capital markets. This type of research produces a qualitative study in the form of descriptive information that seeks to portray present phenomena related to the topic of this research. This article uses a normative approach since it relies on various legal products such as positive law, legal principles, and legal doctrines. Meanwhile, this article also uses an empirical approach to further substantiate the findings, by conducting interviews to dig in-depth into the implementation of positive laws in context and any legal issues that arises.⁶

In general, there are 2 (two) types of data utilized in this research: primary and secondary data. Primary data is obtained directly from the source to dig in-depth information regarding certain topics that the research highlights. Secondary data derived from various relevant legal materials and literature study. The data used in conducting and compiling this article includes primary, secondary, and tertiary legal data.

⁵ A. Junaedi, “Tindak Pidana Insider Trading Dalam Praktik Pasar Modal Indonesia,” *Media Iuris*, vol. 3, no. 3, (2020), doi: 10.20473/mi.v3i3.19639.

⁶ K. Gorobets, “The International Rule of Law and the Idea of Normative Authority,” *Hague Journal on the Rule of Law*, vol. 12, no. 2 (2020), doi: 10.1007/s40803-020-00141-3.

The relevant data that is utilized within this article is obtained through literature review and interview. Secondary data is obtained from conducting a literature study of legal materials, such as documents, books, law magazines, law journals, and other sources accessed through academic sites. Primary data is obtained from the main source by undertaking interviews. It is sourced directly from experts in the capital market sector. Information obtained from an expert is considered as qualitative data which will be used for further examination. The interviewee is selected based on his familiarity and expertise in the capital market and its relevant bodies. The figure interviewed is Yohanes Aples where the author prepared a series of questions to gain practical information on the enforcement of insider trading in Indonesia and OJK's systematics in eradicating such practices. Yohanes Aples is a capital market legal consultant registered to the OJK who holds the manager partner position at Yohanes Aples & Partners law firm. He serves as Vice Chairman of the Association of Indonesian Business Law Consultants (Asosiasi Profesi Konsultan Hukum Bisnis Indonesia, APKHBI) and Head of Treasury Department for Indonesian Construction Dispute Resolution Institute (Lembaga Penyelesaian Sengketa Konstruksi Indonesia, LPSKI). Interview with Yohanes Aples was conducted in Yohanes Aples & Partners Law Firm in World Capital Tower on 26th November 2021 at 17:03 WIB.

After the legal materials and data have been compiled, the author uses qualitative data analysis method that does not use numbers to present its findings but provides descriptions based on findings and therefore prioritizes the quality of data and not the quantity of it.⁷ The author will classify and filter the compiled data based on the quality and its truth which will then be arranged systematically. Then, the assessment of the data will take place by utilizing the deductive method, taking a conclusion from a general view towards a concrete case that is being discussed, which will then be connected to the theories taken from the literature study. Finally, the author will create a conclusion to answer the issue that has been formulated on this research.

II. ANALYSIS OF THE COMPETENCE OF CAPITAL MARKET'S SUPERVISORY AND REGULATORY BODIES IN INDONESIA AND SINGAPORE

Prior to OJK, *Bapepam-LK* held the authority over the capital markets but was deemed ineffective in delivering a robust financial services system that led to

⁷ M. T. Kacperczyk and E. Pagnotta, "Inside Insider Trading," *SSRN Electronic Journal* (2018), doi: 10.2139/ssrn.3142006.

the failure in enforcing laws strictly upon violations of Capital Markets Law.⁸ Consistent with the spirit of its predecessor, the OJK was created to impose regulations and supervise the capital markets, but in more effective ways. The OJK is expected to overcome problems that have been ongoing by creating an integrated, independent, and an accountable financial services system providing protection for consumers and prioritize public interest.

OJK's core function is as a regulatory and supervisory authority for the capital market. In terms of performing its regulatory duties, OJK has the authority to issue regulations in the realm of the financial services sector, OJK regulations, establish a procedural mechanism in the sector, as well as arrange its own internal organization. Subsequently, to run its supervisory functions, OJK is authorized to determine operational policies of supervision, conduct inspections, investigations, and consumer protection concerning financial services institutions, issue written orders, as well as issue various licenses needed by a business engaged in the sector.

In Singapore, its capital market first emerged in 1973 which has been overseen by MAS since passage of MAS Act in 1970. The Singapore Exchange ("SGX") undertakes the day-to-day regulation of the securities market and administers a number of rules and guidelines governing the listing of securities on the platform. On the other hand, MAS still operates as the primary regulatory authority overseeing the offering of securities to the public in Singapore. They have regulatory oversight over the financial services industry across various sectors. In achieving its objectives to make Singapore a dynamic international financial center, MAS performs six oversight functions, including enacting regulations, authorization of financial authorities, supervision of financial institutions, financial surveillance, enforcement, and dispute resolution.⁹

In exercising the powers vested in them over the capital markets, MAS administers the Securities and Futures Act (Cap. 289) together with other regulations incorporated in Securities and Futures Regulation 2005. MAS has the power to administer the SFA and SFR over financial institutions and other parties under the umbrella of the law. Part IV of the MAS Act stipulates the powers, duties, function that is vested in MAS. In relation to the capital market, MAS has the authority to issue directions to financial institutions, establish requirements for prevention of money laundering and terrorism financing, inspect compliance of institutions with directives issued, approve and control of financial institutions, and other authorities in that scope.

⁸ K. Zacharzewski, "Digital asset capital market law: A new discipline of private law2," *Krytyka Prawa*, vol. 13, no. 2 (2021), doi: 10.7206/KP.2080-1084.457.

⁹ A. Saluja, "Financial services in Singapore: An overview of the regulatory landscape," CMS Legal Services EEIG, Germany, (May 2016).

The OJK and MAS both derive their authority through attribution, signifying that the authority is newly established through a provision in the rule of law. In each of the aforementioned laws, powers are conferred to the appointed institutions to regulate and oversee the market.

Table 3.1.
Comparison of authorities held by OJK and MAS

Subject	Indonesia (Law Number 8 Of 1995 Regarding Capital Market)	Singapore (Securities and Futures Act)
Authorized Body	<i>Otoritas Jasa Keuangan</i>	Monetary Authority of Singapore
Nature	Supervisory and regulatory body of financial services sector	Singapore's central bank and integrated financial regulator
Approach	An integrated approach to banking, capital markets, insurance, pension fund, and other financial institutions. Authorities are attributed in Law Number 21 of 2011 regarding OJK.	An integrated approach covering banking, capital market, insurance, payment services, and other financial institutions. Authorities are attributed in the Monetary Authority of Singapore Act.
Regulatory and supervisory authorities in the capital market.	<p>Prescribed under Article 8 of OJK Law to establish:</p> <ul style="list-style-type: none"> a. implementing regulations for OJK Law and financial services sector b. issue regulations and decisions c. regulations on supervision of financial services d. determine duties of OJK e. procedure for issuing written orders f. procedure for appointing statutory managers g. organizational structure h. procedures for imposing sanctions <p>In relation to supervision, OJK has the authority to:</p> <ul style="list-style-type: none"> a. determine operational policies of supervision b. supervise implementation c. supervise, inspect, investigate the consumer protection in financial services institution d. issue written order e. appoint statutory manager f. impose administrative sanctions g. issue or revoke licenses of the financial services sector 	<p>Under MAS Act, the body is responsible for six functions:</p> <p>Enact regulations in a risk-based approach while maintaining principles of anti-money laundering and to combat terrorism financing.</p> <p>Authorize the capital market entities to carry out services in Singapore which covers brokers-dealers, fund managers, CIS trustee, licensed trust companies, financial advisers, markets and exchanges, clearing houses, trade repositories, and benchmark administrators.</p> <p>Supervise the financial institutions to ensure compliance within financial institutions and detect market misconduct. Conduct financial surveillance to closely observe financial institutions and ensure consumer protection by directing the market mechanism.</p> <p>Enforce rules and regulations as prescribed by the law towards contraventions in the market.</p> <p>Provide dispute resolution to resolve matters in scope of financial services.</p>

Table 3.1.
Comparison of authorities held by OJK and MAS (Continued)

Subject	Indonesia (Law Number 8 Of 1995 Regarding Capital Market)	Singapore (Securities and Futures Act)
Authorities within law enforcement	<p>Appoints civil servant investigator to carry out preliminary inspection and investigation in relation to contravention in capital market domain. The civil servant investigator may:</p> <ol style="list-style-type: none"> a. Authenticate the crime occurrence by receiving reports and examination results to verify whether a contravention has taken place. b. Obtain information, by means of summoning, examining, or requesting information of any bookkeeping, records with the ability to detect the location of those documents. c. Request inter-institution data exchange such as from telecommunications provider and assistance from other law enforcers, as well as inquire banks for financial report and to block one's bank account if necessary 	<p>Holds the authority to investigate which includes the scope of:</p> <p>Examination of persons that requires examination towards persons to convey information relating to any contravention. Obtain information, order production/ copy of books, conduct search, seize related documents, and produce the documents.</p> <p>Transfer of evidence, work closely with other institutions to disclose their findings to police officers, public prosecutors, and other law enforcers in the jurisdiction.</p>

III. ANALYSIS OF THE ENFORCEMENT OF INSIDER TRADING BETWEEN INDONESIA AND SINGAPORE

Insider trading refers to unfair securities trading practice of using of confidential information by an employee of the company who, because of their position, is able to profit from securities trading on information that is not in the public domain.¹⁰ Insider trading has the potential for creating systemic risk and disruption to the market which unfair practices of individuals having the upper hand of such information, enabling them to reap more profit by purchasing or selling securities before the price incorporated with the information that is made public. In this sense, the competition between fellow investors becomes unfair which leads to market instability and public distrust. Hence, the objection to insider trading is clear, it is to prevent internal stakeholder of a company from using information concerning securities of that company in their possession to be taken into the extent of gaining their personal advantage.¹¹

In Indonesia, insider trading is prohibited under Articles 95 through 98 of the Capital Markets Law. It states that insiders from a listed or public company

¹⁰ J. Tolokonde, A. Anshar, and W. Z. Imam, "Kebijakan Hukum Pidana terhadap Praktik Insider Trading sebagai Kejahatan Bisnis di Bidang Pasar Modal," *Jurnal Ilmu Hukum: Hermeneutika*, vol. 5, no. 2 (2021): 325.

¹¹ M. K. Jardak and H. Matoussi, "The effectiveness of insider trading disclosure policies: US and EU comparison," *Journal of Financial Reporting and Accounting*, vol. 18, no. 3 (2020), doi: 10.1108/JFRA-09-2019-0120.

who have insider information are prohibited from engaging in the purchase or sale of the listed or public company's securities or other companies in transactions with them.

As elucidated in Article 95 Capital Market Law, the term "insiders" refer to:

- (a) commissioners, directors, or employees of listed or public companies concerned;
- (b) major shareholders of a company;
- (c) individuals, whom, due to their position or profession or having a business relationship with the company, enabling them to obtain information; and
- (d) everyone, who in the last 6 (six) months, held but no longer holds the aforementioned position.

Under Articles 95 and 96 of the Capital Markets Law, insiders are prohibited from engaging in securities transactions whenever they possess insider information, with the to induce other people to purchase or sell said securities or provide insider information to another person. Every person is prohibited from unlawfully gathering non-public material information from insiders. A violation will attract similar penal sanctions as the previous articles. Article 97 of Capital Markets Law prohibits any parties from deliberately in unlawful means obtain and at the end of the day is in possession of insider information. Violation of these prohibitions can be sentenced to 10 (ten) years' imprisonment and a fine of Rp. 15.000.000.000,- (fifteen billion rupiah).

The legal doctrine adhered to in the Capital Markets Law in relation to insider trading is based on fiduciary duty. Fiduciary duty theory says that every employee of company owes the duty to conduct their affairs properly. In a position of fiduciary duty, companies have the obligation of full and fair disclosure to the public. The obligation of disclosure applies to material information, governs all listed companies which trades its shares publicly, and consists of obligations including annual report disclosure, incidental reporting obligations, corporate actions disclosure obligations, and obligations of good corporate governance.¹²

Although supported by many parties, the view of insider trading under the fiduciary duty theory is seen as an under-regulated approach in comparison to misappropriation theory. The latter views insider trading in a much broader manner, covering outsiders (non-fiduciaries) of a company, despite whether there is effort or not in obtaining the information, who can also be held liable if trading uses insider information.¹³

¹² M. Rodriguez-Fernandez, "Social responsibility and financial performance: The role of good corporate governance," *BRQ Business Research Quarterly*, vol. 19, no. 2 (2016), doi: 10.1016/j.brq.2015.08.001.

¹³ Velliana Tanaya and Dicky Winata, "Penerapan The Misappropriation Theory Dalam Pengaturan Insider Trading Di Indonesia (The Application Of The Misappropriation Theory In Insider Trading Regulation In Indonesia)", *Jurnal Legislasi Indonesia*, vol. 12, no. 1 (2015).

Whereas in Singapore, insider trading is regulated by the Securities and Futures Act. It applies to actions occurring within Singapore's jurisdiction in relation to securities of any corporation, whether formed or carrying out business in Singapore or elsewhere. It also applies to actions beyond Singaporean jurisdiction in relation to securities of a corporation that is formed under the laws of or carries on business in Singapore. Prohibition of insider trading is stipulated in Articles 218 and 219 of the SFA. Article 218 regulates prohibited conduct by a connected person in possession of inside information. Herein, a connected person refers to a person connected to a company, either being an officer of that company/related company, a substantial shareholder in that company/related company, or occupying a position that may give them access to the information.

Article 219 prohibits other persons who somehow possess the non-public information. These other persons also fall under the prohibition of insider trading due to their knowledge of the material information. In whatever method used to access the information, everyone in possession of the information has the obligation to maintaining its secrecy, and prohibitions imposed towards connected persons are similarly applied herein.

Although the classification of connected persons and other persons is different for the perpetrator, the same sanctions are applicable. In both cases, the object is the non-public information which due to their position or connection they have a direct or indirect access. Pursuant to Article 221 of the SFA, perpetrators in violation of Articles 218 and 219 shall be guilty of insider trading and shall be held liable on conviction of a fine not exceeding SGD 250,000 (two hundred fifty-thousand Singaporean dollars) and/or imprisonment for a term not exceeding seven years.

The enforcement of insider trading prohibitions in Singapore follows the misappropriation theory, where non-insiders of a company can also be held accountable for trading on non-public information. It is designed to protect the integrity of capital markets against abuses by outsiders to a corporation who in some ways have access to confidential information of a company, although the person does not owe any fiduciary duty to the company. Under this theory, the corporate outsiders owe their duty to the source of information.

Table 3.2.
Comparison of insider trading prohibition and enforcement between Indonesia and Singapore

Substance Of Rules	Indonesia	Singapore
Provisions	Articles 95, 96, and 97 of Capital Markets Law prohibits insiders of a company in possession of non-public information to purchase, sell, procure another person, or tip such information to other parties.	Articles 218 and 219 of SFA on prohibition of a connected person or any other person in possessing inside information. Such persons are prohibited to purchase, sell, procure others, communicate the information.
Approach	Person-based approach or those in a fiduciary duty to the company.	Information-based approach or misappropriation theory.
Scope of legal subjects	Insider of a company or anyone who is attempting to obtain insider information unlawfully.	Connected persons of a company and other persons.
Sanctions	Criminal sanctions and fines in accordance with Article 104. Person in guilty of insider trading is threatened with fine not exceeding 15 billion Rupiah and imprisonment not exceeding 10 years.	Pursuant to Article 221 (1) of SFA, contravention of insider trading shall be threatened with fine not exceeding 250.000 Singapore Dollars or imprisonment not exceeding seven years.
Alternative Enforcement	OJK has the discretion to impose administrative sanctions over violations of rules and regulations.	MAS can bring a case through civil penalty action which requires no process if the perpetrator admits their actions before the court. The court will order perpetrator to pay a sum of the civil penalty with the base of calculation not exceeding: three times the amount of profit obtained, or loss avoided; 2 million Singapore Dollars

IV. ANALYSIS OF THE ENFORCEMENT OF INSIDER TRADING DURING ACQUISITION OF PT BANK DANAMON INDONESIA TBK

The case took place in 2012. It started with a negotiation between DBS Bank and Fullerton Financial Holdings (“FFH”) where the former was interested in acquiring the latter’s ownership of BDMN shares. At the time, the parties decided not to disclose the results of the negotiation to the public. DBS later on announced the proposition to the public in April 2012. During the time between the conclusion of negotiations and its announcement, on 30th March 2012, Rajiv Louis bought 1 million shares of BDMN through his wife’s trading account in Singapore.

In 2015, the MAS became aware of the trade that Rajiv Louis made in 2012 and initiate a civil enforcement action against Rajiv Louis. Although the

purchase was made using Rajiv Louis' wife account, MAS was able to trace it back to Rajiv Louis who at the time of contravention, occupied the position of Indonesia investment banking head at UBS AG. The transaction was influenced by the non-public information that he had which met the requirement for a contravention of insider trading prohibitions.

Subsequently, Rajiv admitted his actions before the court which resulted in an order to pay a civil penalty of SGD 434,912 (\$313,857) which included his \$173,965 profit from the proceeds of purchase and sale of said shares. He was proven liable under Article 218 paragraph (2) of the SFA. In the end, the acquisition deal did not occur due to several regulatory issues, but Rajiv was still held liable for insider trading since there was a significant increase in value and price of the securities after the announcement was made. He took advantage of the lapse of time between the negotiation and the announcement to buy the shares before the information being incorporated in the market price and eventually sold them after the announcement and the market price had increased significantly.

In view of the enforcement by the MAS, elements of the crime for insider trading need to be established. Rajiv was found liable under Article 218 paragraph (2) of SFA regarding prohibited conduct by a connected person in possession of inside information. Firstly, Rajiv Louis fell under the umbrella of a connected person to the company pursuant to Subsection 5 of the Article since he occupies a position that may reasonably be expected to give him access to information that applies to the virtue of any professional or business relationship existing between that company him. To acquire of that knowledge, UBS, the company where Rajiv Louis was working for, has been appointed by Temasek Holdings Pte. Ltd. ("Temasek") as their financial advisor along with Bank of America-Merrill Lynch for the purpose of this acquisition. Temasek itself was the holding company of FFH who was a major shareholder of BDMN, the company DBS negotiated with.

Being the head of investment operations, Rajiv Louis ostensibly played an active role in advising Temasek or at least get involved in the process. This position provided him all the details starting from the deal itself up until matters on share price. That information should have been sufficient for Rajiv Louis to know the initial BDMN share price and its projection in the future, which he takes advantage of. Hence, he is a connected person to the subject company.

From this and other insider trading cases decided judicially by MAS, a civil penalty action is prioritized in the enforcement of the law because it is highly effective. The MAS does not need to follow through with criminal proceedings and meet the greater burden of proof which are both very costly. The

penalties given are also deterrents that consider the gain that the perpetrator has obtained due to his offense. The minimum cost of enforcement kept, and the high amount of penalty inflicted to the perpetrator signifies an effective punishment.

Although the illegal practice arose from the acquisition of an Indonesian listed company, OJK chose to decline jurisdiction of the matter and the law enforcement function were not implemented which increased the impression that insider trading is permitted in the market. While imposing sanctions on perpetrators is very crucial for the purpose of law enforcement, Rajiv Louis did not go through any criminal proceedings or subject to any administrative sanctions in Indonesia since OJK did not pursue the case.

V. ANALYSIS OF OJK'S LAW ENFORCEMENT

Since its takeover of governance of the capital markets in December 2012, OJK has been known to opt for administrative sanctions when faced with the contravention of insider trading regulations. There were some cases where OJK had conducted investigations yet did not pass the prosecution stage since the public prosecutor had not ensured with sufficient evidence to bring the case through criminal proceedings. OJK eventually chose to declare it as an administrative violation and there was no case where a contravention of insider trading is charged with criminal sanctions.

The degree of complexity in proving an insider trading violation has occurred to the law enforcers, indirectly omits criminal sanctions imposed against the perpetrators when it creates a deterrent effect. It can be said that the Indonesia's criminal procedural law, which OJK has to adhere to, is not fit to enforce law and sanction against insider trading that in practice has grown rapidly following technological development.

In addressing cases with international elements concerning Indonesian capital markets or its listed companies, the law needs to accommodate the authorities to obtain information and evidence and potentially exercise authority from overseas. The tendency of securities trading which permits cross-border activities needs to be regulated, otherwise signifies the permission to conduct insider trading to occur in Indonesia. If there is no significant change to address this matter, irresponsible parties will take advantage of the loophole. The degree of complexity of contravention keeps on increasing while the protection remains at the same level which does not support an efficient market hypothesis. With that, the market is prone to the occurrence of market misconduct.

In order to grasp the real-world practise on the matter, the author conducted an interview with Mr. Yohanes Aples, a registered capital market legal consultant under OJK, on 26 November 2021, at Yohanes Aples and Partners office in World Capital Tower, Jakarta. According to him, there are various variables that need to be weighed by OJK before deciding to adjudicate a case, which explains the rationale behind opting not to pursue cases to criminal proceedings or even leaving cases not to be enforced at all. These variables influence the passive enforcement portrayed by OJK.

Firstly, the realm of insider trading goes beyond what has been laid out in the law.¹⁴ Since the use of technology, the capital market realm has become too advanced which makes it hard for the law enforcers to trace contraventions. These transactions will just seam into the system by not showing any anomaly from it, leaving no room for suspicion to the authorities. In practice, those who intend to commit insider trading will not use their own identity to engage in the transactions. Instead, they will use the identity of people close to them to make sure the transaction will not leave any trace.

Secondly, there is a lack of proof in the underlying evidence that the authorities should gather. The insiders who try to make a deal with another person, most likely will not put the agreement in writing. Instead, the dealings are all made based on a conversation either face-to-face or through a call which leaves no written document as evidence to sum it up. With that in mind, the authorities find it hard to collect sufficient evidence to bring the case up to prosecution due to the lack of proof, while in criminal procedural law only those prescribed in the law as evidence are eligible to stand before the court.

The direct evidence in insider trading is exceedingly rare and is more likely to be established through circumstantial evidence. With that in mind, there is the need for authorities to establish a chain of events and piece together the evidence. Because evidence is circumstantial, law enforcement agencies need to be able to connect the dots between one piece of evidence and the other to compose a story out of it that implies the act of insider trading.¹⁵

Thirdly, the enforcement function of OJK is clouded by its duty to maintain public interest. Herein, the capital market itself is loaded with lots of risks in the first place since it deals with the capital of a listed company and on the other hand, also deals with the public's money. Enforcement of insider trading stipulations can affect one party or the other. If OJK decides to impose sanctions on listed companies or certain employees who are proven guilty of market misconduct, it will most likely devalue its market price which effects

¹⁴ M. T. Kacperczyk and E. Pagnotta, *Op.cit.*

¹⁵ A. D. Jagolinzer, D. F. Larcker, G. Ormazabal, and D. J. Taylor, "Political Connections and the Informativeness of Insider Trades," *Journal of Finance*, vol. 75, no. 4 (2020), doi: 10.1111/jofi.12899.

will also take a toll on the public investors. On the other hand, fines given in small amounts will put the perpetrator in an advantageous position since the profit reaped is bigger compared to the compensation that needs to be paid.

From the scenarios mentioned, it leaves a dilemma for the OJK whether to provide strict law enforcement or protect the public interest. With no serious means of enforcement, the retail investors from the public will always be the one that receives negative impacts. Opting for one means sacrificing the other, hence the enforcement function in OJK has been distracted for the sake of public interest.

Lastly, the enforcement culture in OJK has not yet been shaped equally as a whole. Being the super regulatory organization and independent body does not automatically establish a strict enforcement culture. In reality, that culture needs to be generated within the institution to all its employees without exception. The enforcement culture in OJK has yet to achieve the strict level that foreign bodies such as MAS have portrayed. By means of authority, the power attributed to them is adequate to enforce the law but in its implementation, the enforcement depends on each personnel's assertiveness and initiative. All written law enacted bears its soul on the authorities which put OJK in charge for the capital market sector. In this sense, the personnel are the one who carry out the enforcement function and it depends on how they would like to pursue each case.

However, enforcement does not always have to be from OJK. Besides the civil servant investigator, Indonesia's criminal proceedings also stipulate the role of the police as an investigator. The enforcement function does not fall merely on OJK as the police may take the case over and exercise their authority. In this sense, Indonesian National Police (known as "*Polri*") has their own investigatory department called Badan Reserse Kriminal Kepolisian Negara Republik Indonesia ("*Bareskrim*") that has been given the authorities to investigate and conduct preliminary investigation of crime.

Due to the rising number of disputes in regard to special crime, *Polri* has been mobilizing serious means of investigation towards economic crimes. *Bareskrim* has a division that is particularly assigned to investigate and supervise economic crimes which lately have also handled several capital market-related cases. Direktorat Tindak Pidana Ekonomi dan Khusus ("*Ditipideksus*") in a few years back have started to penetrate economic crimes in the capital market with landmark cases such as PT Jouska Finansial investment fraud.

As insider trading falls under the category of economic crime in the capital market, parties can now resort to reporting to the police as opposed to OJK. *Polri* has been intensely showing their work to eradicate all forms of economic crime since it resulted in public loss. With that in mind, the public or any parties at loss is not tied to merely dependent on for OJK to act. *Polri* has opened its

doors to receive any report on economic crimes including contraventions in the capital market sector, which provides room for any parties at loss to file such contraventions to the *Ditipideksus* where similar investigatory functions will be performed.

At the end of the day, the consideration of establishing a capital market regulatory and supervisory body goes back to the nature of the capital market, which serves as a funding platform for listed companies and as an investment vehicle for the public. This platform should be kept in a fair and equal manner by providing sufficient protection for all parties involved for it to continue its existence. The way to provide adequate protection is for the market to be heavily regulated. Therefore, capital market regulatory and supervisory bodies should be able to conduct its function in order to keep that balance so the nature of capital market would not deviate from its main purpose.

VI. CONCLUSION

The nature of competence between Indonesia and Singapore's capital market supervisory and regulatory bodies is quite similar which adopts integrated approach towards regulation and supervision of the capital market with adequate authorities attributed to them. Since 2012, OJK replaces the role of *Bapepam-LK* to administer the Capital Market Law as an independent body. OJK is responsible for enacting rules and supervisory of the sector. As part of supervision, OJK also runs the enforcement in the capital market by means of criminal proceedings or inflicting administrative sanctions. However, OJK has been acting passively in enforcing law against illegal transactions. In Singapore, MAS undertakes the capital market regulatory and supervisory functions, assigning them authority to enact regulations, authorization, supervision, enforcement, and dispute settlement. MAS administers SFA upon all parties in the capital market, acting as the gatekeeper of financial institutions in Singapore. In terms of law enforcement, MAS has been extremely strict in imposing sanctions upon contraventions occur in Singapore or concerning Singapore companies. Contraventions can be pursued either as a crime or through a civil penalty action approach.

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