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Research Article

Efficient Punishment for Insider Trader In Merger: Interjected Values of Economic Analysis of Law

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ABSTRACT: Corporate crime is one of the crimes that arise with the advancement of economic, technological, and trade liberalization activities. The problems with handling non-conventional crimes are due to the difficulty in determining the victims and criminal prosecution of perpetrators. Corporate liability and imposing sanctions on corporate entities are still strongly influenced by the *societas delinquere non potest* principle. One of the capital market crimes that may occur as a corporate crime is insider trading, which can be defined as securities trading transactions conducted by insiders utilizing insider information that has not been published. Information on a merger, a form of corporate restructuring, is categorized as material facts. When insider trading occurs in the merger process, verifying it for punishment is complicated considering the legal vacuum to convict such a crime. While closely related to financial matters, the prosecution of corporations also intersects with purposes and functions that protect society and individual offenders. Economic analysis of the law can answer the legal vacuum and determine the important aspects of proper legal practice, so that a specific and appropriate punishment can be found for the offense, considering that not all penalties can be imposed on corporations.

KEYWORDS: Economic Analysis of Law, Punishment, Insider Trading, Merger.

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I. INTRODUCTION

In 1995, Indonesia's government accommodated the existence of corporations as legal subjects with the establishment of Law Number 1 of 1995 later amended by Act Number 40 of 2007 concerning Limited Liability Companies. Corporate arrangements are regulated across several laws, including the definition of business entities, companies, associations, foundations, unions, organizations, and other forms of companies as legal subjects. Unlike the concepts in civil law, Indonesian criminal law does not recognize the terminology of corporations. Even though in line with economic development, the existence of corporations no longer only deals with the field of civil law but has also become relevant in criminal law. In the field of criminal law, crime can be identified by the occurrence of harm, which then results in the introduction of criminal liability.[1] This has invited a debate on corporate liability, considering that Article 59 of the Indonesian Criminal Code recognizes only humans, in their natural biological state, as legal subjects.

The lag of the Indonesian Criminal Code in including corporations as criminal legal subjects then forces the government to regulate corporate entities in other special legislations such as Emergency Law Number 7 of 1955 concerning Economic Crimes, Law Number 11/PnPs of 1963 concerning Eradication of Subversion Activities (revoked by Law Number 26 of 1999), Law Number 9 of 1976 concerning Narcotics (revoked by Law Number 22 of 1997), Law Number 32 of 2009 concerning Environmental Protection and Management, Law Number 20 of 2001 concerning Amendment to Law Number 31 of 1999 on Eradication of Corruption, Law Number 1 of 2023 concerning Criminal Law Code, Perma Number 1 of 2016 concerning Procedures for Handling Criminal Cases by Corporations, Regulation of the Attorney General of the Republic of Indonesia concerning the Guidelines for Handling Criminal Cases by Corporation as Legal Subject, and several other laws that regulate corporations.

To protect the public from criminal acts and violations that occur in capital markets, several articles within Law Number 8 of 1995 concerning the Capital Market regulate these types of criminal acts, including fraud, market

[1] Vikrant Yadav, "Corporate Criminal Liability: A Comparative Analysis of Judicial Trend" (2015) 1:10 International Journal of Applied Research at 757 & 760.

manipulation, and insider trading, which have consequences of legal sanctions. Insider trading in the capital market is caused by asymmetric information, in which one party has access to more information than the other party.[2] Insider trading is defined as securities trading transactions carried out by insiders that utilize information that has not been published publicly. Provisions regarding the prohibition of securities transactions by insiders or individuals who have insider information are regulated in Article 95 to Article 99 of the Capital Market Law. The subject of insider trading referred to by the Capital Market law still adheres only to errors made by individuals and has not regulated corporations as a subject of criminal law, even though insider trading can also be committed by corporations. Material information gaps that are the object of insider trading are related to the Capital Market Law and supported by Article 6 of the Financial Services Authority Number 31/POJK.04/2015 concerning Information Disclosure or Material Facts by Issuers or Public Companies. Information regarding and related to the merger process is categorized as material facts and, therefore, is deemed as the object of insider trading.

Criminal punishment against corporations, while closely related to financial matters, also deals with other goals that are more entrenched. This was revealed from Friedman's view, namely: "The main effect and usefulness of a criminal conviction imposed upon a corporation to be seen either in any personal injury or, in most cases, in the financial detriment, but in the public opinion and stigma that attaches to a criminal conviction."[3] Based on this statement, a combined approach between legal science and economics is expected to address the legal vacuum for the problem. This approach is known as Economic Analysis of Law (EAL), which uses different scientific concepts of economics and law (jurisprudence), especially in capturing human behavior. Given the focus on legal arrangements in governing human actions, in which humans are the object of such arrangements, economics can expand on studies that law (jurisprudence) cannot do by pivoting to human rationality.[4] Modern utilitarian ethics is behind

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2 Roberta S Karmel, *Outsider Trading on Confidential Information - a Breach in Search of a Duty* (Rochester, NY: Social Science Research Network, 1996) at 91.

3 Wolfgang Gaston Friedmann, *Law In A Changing Society* (California: Literary Licensing, LLC, 2012) at 318.

4 Economic Analysis of Law (EAL) in the history of the development of jurisprudence is one of the frameworks of thought born from the utilitarian school of Jeremy Bentham. Utility becomes an objective principle and standard for deciding which laws are good and which are not. According to Bix, B.H on Jurisprudence: Theory and Context, the utility of this point must be understood as the only dimension that directs an action, namely, to produce benefits by

the construction of EAL, which can be applied in normative research that focuses on developing formulas to achieve efficiency—in this case, to determine more accurate punishments. Normative analysis asks how the law can be improved to better achieve the goal of efficiency.[5] Economic analysis of law is used not only to measure punishment with economic losses that arise but also to provide a deterrent effect. The analysis is also carried out thoroughly by looking at the efficiency of various aspects regarding the victims, perpetrators, and even the state and law enforcement. The law needs to determine important aspects of proper legal practice,[6] so that a specific and appropriate punishment for insider trading crimes in the merger process, as a corporate crime, can be determined.

Using an economic point of view, that is, an economic analysis of law, is expected to provide clarity on the legal vacuum against insider trading in the merger process as a legal issue in this study. The author addresses two questions, namely: (1) What are the characteristics of insider trading in the merger process?; and (2) how does economic analysis of law toward punishment for insider trading during a merger a corporate crime in Indonesia? This writing article aims to identify the characteristics of insider trading, specifically during the merger process, as well as project an ideal punishment for insider traders who illegally disclose information, from the lens of the economic analysis of law.

II. METHODOLOGY

The method used in this research is normative legal research on statutes and regulations. The focal point of normative legal research, following the typical character of legal science, lies in the study of law or positive law which includes three layers of legal science, that is, dogmatic studies, legal theory, and legal philosophy. This paper applies a normative legal study that critically and comprehensively reviews the EAL against insider trading in the merger process as a corporate crime. There are three approaches used in this research, namely, the statute approach, the conceptual approach, and the comparative approach.

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preventing or reducing uselessness such as mischief and evil, thus making this principle a teaching of censorial jurisprudence.

5 Mitchell A Polinsky, *An Introduction to Law and Economics*, 5th ed (New York: Wolters Kluwer, 2019) at 79-80.

6 Fajar Sugianto, "Efisiensi Ekonomi sebagai Remedy Hukum" (2024) 9:18 DIH Jurnal Ilmu Hukum at 66.

The collection of legal sources begins with library research, which is an inventory of all legal materials related to the subject matter, both primary and secondary legal sources. Then, the classification of relevant legal materials is organized systematically. Materials obtained from literature studies are selected and grouped according to the character of legal materials, especially those that are strongly related to the legal issues, by first identifying collected materials, and then describing and systematizing them based on legal theories, concepts, and principles from the lens of EAL.

III. CHARACTERISTICS OF INSIDER TRADING IN THE MERGER PROCESS

In practice, insider trading is a criminal act that has distinctive characteristics, in which the object of the crime is information. In addition, it is carried out by people who have expertise and intelligence in the field, relying not just on physical abilities, but rather on the ability to read the market situation and use it for personal gain. There are other distinguishing characteristics, namely, the evidence tends to be difficult to obtain, and the impact of the violation can be fatal and widespread.[7]

Article 95 of the Capital Market Law states that trading securities can be classified as a practice of insider trading when it meets three minimum elements, namely: i) the presence of insiders; ii) information gaps; iii) illegal transactions in the capital market conducted by an insider.

A. An Insider

According to Article 95 of the Capital Market Law, an insider is defined as:

1. Commissioner, director, or employee of the issuer. This refers to all organs of a legal entity in the form of a limited liability company, as defined in Law Number 40 of 2007 on Limited Liability Companies.
2. Main shareholder of the issuer. An issuer is a public company that exercises a public offering of shares following the provisions and regulations in the field of capital market as stated in Article 1 verse (7) of Law Number 40 of

7 Attila Balogh, "Insider Trading" (2023) 10:1 Scientific Data at 7.

2007 on Limited Liability Companies. Meanwhile, the main shareholder refers to owners of the majority of issued shares as stipulated in Part Five of Law Number 40 of 2007 on Limited Liability Companies.

3. Any individuals who allow any persons to obtain information because of their position or profession, or business relationship with the issuer or public company. It means any affiliated party described as:
   i. A family's relationship by marriage and descent to the second degree, horizontal as well as vertical.
   ii. A relationship between any persons and their employees, directors, or commissioners.
   iii. A relationship between two companies with one or more directors or commissioners in common.
   iv. A relationship between a company and any persons that directly or indirectly controls, or is controlled, by that company.
   v. A relationship between two companies that are controlled directly or indirectly by the same person.
   vi. A relationship between a company and major shareholder(s).
4. Parties who within the last six (6) months are no longer parties as stated above in points a, b, or c.

Therefore, an insider who has inside information is prohibited from buying or selling securities of the issuer with which the insider is associated. Based on the principle that an insider must prioritize the company's interest and its shareholders as a whole, this duty precludes the insider from benefiting illegally from the information for his/her personal benefit, not for the benefit of others.

The word "position" refers to a position in a government institution, private institution, or agency. "Business relationship" refers to a work relationship or partnership in a business context, including the relationships with customers, suppliers, debtors, and creditors. "Insider information" is material information owned by an insider that is not yet available to the public. "Profession" refers to the legal consultant or lawyer who ensures due compliance with all legal and regulatory requirements and relevant corporate approvals. In this context, it refers to legal professionals who work on transactions involving the sale of debt or equity securities and provide legal advice, handling legal documents that contain information.

Anyone could be an insider provided he/she has access to the information. In practice, an insider is usually:

a. The company's top officials, namely, directors and commissioners.
b. Certain employees of companies, other than directors and commissioners, who have access to nonpublic information (e.g., corporate secretary).
c. Independent contractors who have certain confidential relationships with the company.
d. Tippees, namely, outsiders such as spouses, friends, or neighbors who are given information by insiders either freely or not.
e. Secondary tippees, who receive information not directly from insiders but through other tippees.[8]

When compared with the capital market theory from the United States, the interpretation of an insider can be constructed by two theories, namely, fiduciary duty and misappropriation theory. The theory is similar, as referred to Sections 10 (b) and 10b-5 of the Securities Exchange Act (SEA) of 1934, which provide the following definitions of an insider:

1. Officers, directors, and employees at all levels of the company.
   The term "officers, directors, and employees" refers to any employed persons of a corporation performing functions concerning any organization, whether incorporated or unincorporated.[9]
2. Lawyers, accountants, consultants, and other agents and representatives hired by the company on a temporary and non-employee status to provide services or work to the company.
   The term "lawyers, accountants, consultants, and other agents and representatives" refers to any member representing the company's legal interests in performing any actions to be regulated under SEA and enforcing compliance with the provisions of SEA.[10]
3. Other parties who possess a fiduciary duty to the company.

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8 Brad Goldie et al, "Indirect Insider Trading" (2022) 58:6 Journal of Financial and Quantitative Analysis at 2358-2359.
9 Amber Thomas, "Securities Exchange Act of 1934" (2017) 2:4 Economics: The Definitive Encyclopedia from Theory to Practice at 366-367.
10 *Ibid.*

> This means any person with a fiduciary duty, which requires the person "to adopt the principal's goals, objectives, or ends."[11]

Based on the fiduciary duty theory, anyone who is paid by the company to carry out given tasks for the benefit of the company must carry these out with due diligence. Based on the misappropriation theory, insider provisions have a broader meaning, that is, anyone who conducts securities trading is considered to have carried out insider trading by using nonpublic information about a company, this includes trading transactions based on information that has not been made public yet.[12]

It is clear then the definition of insider trading is not comprehensively explained in the Capital Market Law. This is because the notion of insider trading in Capital Market Law is still concerned with the fiduciary duty theory. Whereas, the characteristics of insider trading according to the misappropriation theory are more distinctive, specifically involving the abuse of nonpublic information, insiders and/or persons who have access to the information, and illegal transactions conducted under personal and group interests. The misappropriation theory can serve to extend the definition of an insider in the future, given that many practices can be classified as insider trading but cannot be prosecuted because the perpetrator is not considered an insider.

B. Asymmetric Information

Article 1 of Indonesia's Capital Market Law defines information or material facts as important and relevant information regarding any events or facts that can affect the price of securities on a stock exchange and/or decisions of investors, potential investors, or other interested parties. An example in the context of merger acquisitions, consolidations, and joint ventures is information that may affect the decisions of investors.

According to Article 1 numbers 9, 10, and 11 of Law Number 40 of 2007 on Limited Liability Companies, a merger is a legal action taken by one or more companies to merge with another existing company, which causes the transfer of

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11 *Ibid.*

12 Robert T Masson & Ananth Madhavan, "Insider Trading and the Value of the Firm" (1991) 39:4 The Journal of Industrial Economics at 343 & 353.

assets and liabilities of the merging companies by operation of law to the surviving company, and thereafter, the legal entity status of the merging company ceases by operation of law. Consolidation is a legal action taken by two or more companies to consolidate themselves by establishing a new company, which by operation of law obtains the assets and liabilities from the consolidating companies, and the legal entity status of the consolidating companies ceases by operation of law. An acquisition is a legal action taken by a legal entity or an individual to acquire the shares of a company, resulting in the transfer of control of such company.

These actions require the exchange of solid and precise information such as assets, sales value, and the companies' capital structure, including debt and equity. Such information is categorized as material facts that, to some extent, can affect the price of the securities and/or influence the decisions of investors, candidates, financiers, or other interested parties in entering the secondary market.

Article 6 of the Financial Services Authority Regulation Number 31/POJK.04/2015 concerning Information Disclosure or Material Facts by Issuers or Public Companies clearly states that material information and facts must be immediately announced to the public.

Economic theory shows that prices listed on exchanges and other securities markets always reflect agreements between investors regarding fair prices, based on available information.[13] Existing material information must be able to influence price changes in securities. If there is no change in the stock price, it does not meet the material information category. Subjectively, material information will guide investors in buying and selling to determine their investment policy. Objectively, the facts show that the price of securities is very dependent on the information available. Positive information about a company or issuer, such as an issuer earning enhanced profits, can make the issuer's share price rise, whereas negative information may cause the stock price to decline.

Information is very much exchanged in the world of capital markets. It is the keyword and the core of the business, which is why most provisions related to

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[13] Eugene F Fama, "Efficient Capital Markets: A Review of Theory and Empirical Work" (1970) 25:2 The Journal of Finance at 402.

capital markets heavily regulate information—what information may be disclosed, by whom, how, and the limitations, elements, manipulation of, and any other important aspects. These aspects are all covered by the term "disclosure". There are at least three functions of the principle of disclosure in capital markets: first, to maintain public trust in the market; second, to create an efficient market mechanism; and third, to prevent fraud in the context of protecting investors.[14]

The issue of asymmetric information leading to illegal transactions became a major headline due to the case of PT. Jiwasraya. The Republic of Indonesia Supreme Audit Agency (*Badan Pemeriksa Keuangan*) and the Attorney General's office investigated Jiwasraya's insurance policy default and found that it was due to the purchase of low-quality, high-risk shares, and mutual fund instruments with parties allegedly conducting price manipulation that resulted in negative spreads and liquidity pressure on the company.[15] As of June 30, 2018, Jiwasraya is known to have 28 mutual fund products with 20 of them having a share above 90 percent. Most of these mutual funds are low-quality and liquid funds.

Moreover, Jiwasraya often placed funds in fried stocks including PT. Sugih Energy Tbk., PT. Trikomsel Oke Tbk., and PT. Eureka Prima Jakarta Tbk. The placement of shares was not supported by a review of adequate proposals. After investigating files from 2008 to 2018, *Badan Pemeriksa Keuangan* predicted a potential state loss of Rp 16.8 trillion due to the company's activities—Rp 4.65 trillion from stock investment and Rp 12.16 trillion from mutual fund investment.[16] In countries like Zambia, where a company is declared insolvent, there is an incentive to continue trading. Should the trade benefit its shareholders (or directors), and given the principle of limited liability, the company will likely exercise these trades as they have everything to gain and nothing to lose.[17] If the trade-out declines, the company suffers no additional losses, and these will be

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[14] Frank Easterbrook & Daniel Fischel, "Mandatory Disclosure and the Protection of Investors" (1984) 70:4 Virginia Law Review at 706-707.

[15] Fika Nurul Ulya & Sakina Rakhma Diah Setiawan, "BPK Sebut Jiwasraya Investasi di Saham Gorengan Ini, Apa Saja?", (2020), online: *KOMPAS.com* <https://money.kompas.com/read/2020/01/08/181838426/bpk-sebut-jiwasraya-investasi-di-saham-gorengan-ini-apa-saja>.

[16] Syahrizal Sidik, "Skandal Jiwasraya: Negara Rugi Rp16,8 T, Aset Sitaan Rp18,4 T", (2020), online: *CNBC Indonesia* <https://www.cnbcindonesia.com/market/20200921145035-17-188250/skandal-jiwasraya-negara-rugi-rp168-t-aset-sitaan-rp184-t>.

[17] Kenneth K Mwenda, "Wrongful Trading and Fraudulent Trading in Corporate Insolvency Law: The Case of Zambia" (2024) 8:1 Oxford University Commonwealth Law Journal at 97.

borne by the company's creditors. From this case, we learn that as long as the legal status of the company exists, the principle of limited liability creates a perverse incentive for an insolvent company to continue to trade.

C. Unlawful Trading

Insider trading transactions are referred to as illegal transactions in the capital market sector because they are carried out by people who are not entitled to information on traded securities. Concerning the benefits of conducting share ownership transactions in the capital market, there are essentially two benefits obtained by investors by buying or owning shares, that is, dividends and capital gain.[18]

In comparison to the Jiwasraya case that led to market failure, unlawful trading has likely resulted in market failure as well. The United States, with an estimated GDP of $29.017 trillion in 2024, is considered to be one of the world's biggest economies, comprising 15% of the global economic output. Wall Street is the trading center of the world's largest financial markets, and the New York Stock Exchange, based there, is also a worldwide leader in terms of listed companies' average daily trading volume and overall market capitalization.

Despite having a developed stock market, market manipulation, as one of the forms of unlawful trading that involves insiders, still occurs in the US market. The parties (including insider(s)) involved in market manipulation conduct sham orders to create artificial movements in the volume and price of the market for their benefit. It inflates the price of the financial instrument that is traded, such as securities, as parties repeatedly conduct trades to increase the price of the instrument. Such practice is considered unlawful and causes unwitting and innocent parties to buy those financial instruments at artificially inflated prices.[19]

Despite being used to increase the price of instruments in the market, unlawful trading can also be considered as a scheme to drive market prices downwards. Parties involved, especially the organ of the company, i.e., the director, in any

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18 Goldie et al, *supra* note 8.

19 Fajar Sugianto & Shintaro Tokuyama, "False Transaction vs Wash Trading: Addressing the Gap to Rebuild Market Confidence (Legal Implication in Indonesia and United States Capital Market Law)" (2024) 5:1 Journal of Law and Legal Reform at 78.

unlawful trading, either in increasing or decreasing the price, are not exposed to real financial risks as they continuously gain from the deceitful methods conducted to create an illusion of trade in the market, which impacts the prices and volume of instruments traded.[20] The involvement of insiders in conducting unlawful trading schemes also generates rebates and kickbacks from providers, such as exchanges and brokers, in addition to being initiated to manipulate rates. Due to these reasons, the US Congress and courts consider these practices to be an unconstitutional challenge to the proper and fair functions of the financial markets.

With the sole purpose of preventing market failure due to unlawful trading schemes, the case of the Great Depression in 1929 shall be taken into consideration as arguably the worst financial crisis for the US, wherein its stock markets lost over 85% of their value. The stock market crash resulted in nearly 5,000 banks being closed, leading inevitably to bankruptcies, rising unemployment, pay cuts, and even homelessness.[21]

Generally, the benefits of stock transactions are very closely related to the information on the material facts and activities of investors in the capital market. Therefore, transactions carried out using information that is not yet open can harm the public and may be considered as serving self-enrichment purposes. The Capital Market Law plays a very important role in investor protection. This protection is mainly carried out in two ways, namely, (a) through the principle of full disclosure, and (b) through rules that prevent market manipulation, including the prohibition of insider trading.[22] Therefore, the principle of full disclosure, i.e., transparency of information, is very important in transactions in the capital market requires companies to provide all relevant information in their financial statements that helps users of financial information make informed decisions about the company. By promoting the efficacy of transparency, this principle also limits the opportunities for fraudulent activities as well as reduces information asymmetry.

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20 Mwenda, "Wrongful Trading and Fraudulent Trading in Corporate Insolvency Law", *supra* note 17.

21 Gary Richardson et al, "Stock Market Crash of 1929", (1929), online: *Federal Reserve History* <https://www.federalreservehistory.org/essays/stock-market-crash-of-1929>.

22 Balogh, *supra* note 7.

Some characteristics of disclosure principles are: (1) the degree of accuracy of information, (2) the completeness of information, and (3) the balance between negative and positive factors.[23] The full disclosure principle is a form of indirect investor protection. The government, or capital market authority in this case, is in principle trying to ensure that investors get information as complete and as clear as possible. The capital market authority will require issuers to always provide information to the public that is complete, clear, and timely.[24]

However, like most juridical regulations on legal institutions that directly impact the interests of society, the necessity of disclosure for a company presents a dilemma. On one hand, the interests of the community or other parties need to be protected by requiring the disclosure of information. On the other hand, the interests of the company or its organs also, to some extent, need to be protected by not being too open to outsiders. As usual, the law seeks an equilibrium point so that the interests of different parties are not unfairly sacrificed.

Indirect protection means that the law opens up the possibility of disclosure obligations for a company, but only to certain limits. These limits need to be further elaborated in the legislation and other legal sources. The exceptions to this disclosure are:

a. A fall in corporate profits that is suspected to be temporary and not significant;
b. Information that is allegedly misleading; and
c. Contracts that the partners require confidentiality for a certain period.

The first two exceptions are coupled with the laws' requirement of disclosure to ensure that material information is made available to all investors. The basic idea of the disclosure principle, under Article 1 (25) of the Capital Market Law, is reflected in activities described in Articles 91 and 92. Concerning materiality, the reasonable investor standard will be utilized when assessing particular information. This also aids in defining the scope of a particular company's disclosure obligations. The 'bright-line rule' is and can be adopted when determining the materiality of certain information. This rule only obliges the

23 Walayet Khan et al, "The Impact of Insider Trading on Market Liquidity In the NASDAQ Market" (2005) 21:4 Journal of Applied Business Research (JABR) at 12 & 22.

24 Goldie et al, *supra* note 8.

disclosure of 'statistically significant' information. The notion of a reasonable investor is vague and ambiguous, however future regulations may aid in its interpretation.

The third exception is the element of causation, which can be divided into transaction causation and loss causation. Transaction causation mirrors the notion of reliance, where the investor is dependent upon market price in determining the purchase of a financial instrument. Loss causation, on the other hand, requires the investor to determine a causal connection between the misstatement or omission of disclosed information and the economic losses suffered. This can be observed in the decline of stock prices following the corrective disclosure of a misstatement.

Business actors as economic subjects always strive to maximize profits in carrying out their business activities. Maximizing profits will be pursued in various ways, and one of the ways businesses can take this is through a merger. Profit maximization is expected to occur because, in theory, a merger can create efficiency to reduce the production costs of the merged company.

In connection with the criminal acts of insider trading, a merger is categorized as material information as stipulated in Article 1 Number 7 of the Capital Market Law in conjunction with Article 6 point (a) of the Financial Services Authority Regulation Number 31/POJK.04/2015 concerning Information Disclosure or Material Facts by Issuers or Public Companies.

Corporate restructuring activities in Indonesia, including mergers, acquisitions, and consolidation, are prestigious and crucial topics in Act Number 40 of 2007 concerning Limited Liability Companies. Article 84 of the Capital Market Law requires that every merger, acquisition, and consolidation shall be conducted according to Act Number 40 of 2007 concerning Limited Liability Companies and comply with the provisions regarding transparency, fairness, and legal compliance. Thus, disclosure provisions in mergers must be applied following the laws including the obligation to publish information in newspapers publicly.

Insider trading in the merger process can be done by individuals or corporations. The classification of insider trading based on the type of legal subject involved can be explained as follows:

A. Individual Legal Subject

Provisions on insider trading in the Capital Market Law are more defined for individual actors. The insider referred to in the Capital Market Law implies that an offender is any person who acts for and in his/her name. Though an insider can be part of a corporation (company), their malicious intentions and actions stem from themselves. Therefore, the expansion of the characteristics of insider and transaction models through theoretical approaches becomes an advantage to ensnare every insider trading agent.

Since a merger is an activity that takes a long time, insider trading can be assumed in two main stages, that is, when the merger process takes place and when it has ended. This situation has different consequences. If insider trading occurs when the merger is in progress, probably, the other party will immediately terminate the merger process due to the fraudulent practice. Insider trading actors can certainly be criminally processed following the applicable laws.

In essence, insider trading carried out by individuals does indeed affect the movement of corporations that are merging or have merged so that the potential for significant losses is possible. Provisions of the positive laws on the Indonesian capital market have regulated the entanglement of these crimes, except that they need to expand their characteristics. As a result, the heaviest burden is to prove the existence of criminal insider trading.

B. Corporation Legal Subjects

If insider trading during the merger process is carried out by a corporation, the principle of fiduciary duty is valid if the legal subject can be narrowed down, namely, only insiders who have a strategic position within a company and can act for and on behalf of the company. In this case, the organs of the company, consisting of directors, commissioners, and shareholders own more than 10% of issued shares. Any juristic act taken by the organs of the company is classified as the actions of the corporation.

Insider trading occurring at the time of the merger process versus when the merger process has ended departs from the same implication. If the merger process is still ongoing, the corporation charged is still a separate legal subject. Therefore, the merger can be dismissed immediately and the corporation that is suspected of conducting insider trading can be immediately examined. It is a different story if the merger process has ended and the corporations that commit insider trading have already joined other corporations. The punishment for perpetrators of corporate crime becomes vague and has the potential to exacerbate the injustices that have occurred.

It should be noted that the assumption of this period also relates to the investigation process. Although the time of occurrence of a criminal act will certainly not change, the legal subject before the merger and after the merger has changed. The change in legal subjects presents difficulties for law enforcers to impose criminal penalties.

In addition, the crimes imposed on corporations have also not been definitively regulated in the Capital Market Law. Some of the laws that have regulated corporate punishment impose more criminal penalties on corporations in the form of fines and administrative sanctions. However, the next problem is how to impose fines on merged assets. This is certainly not easy for the merging party, which may feel disadvantaged because they have nothing to do with the crime committed by the corporation.

Another difficulty is created by the principle of good faith, that is, everything that is based on criminal conduct or bad faith is null and void. Insider trading occurring during the merger process renders the legal process invalid, therefore, the existence of the merged corporation becomes null and void. This has become unfair for other corporations that have merged in good faith and have applied prudential principles. Although it is unfair, it is morally wrong and harmful if the merger process remains legal and lawful. Because of these characteristics, criminal acts committed by such corporations can be categorized as corporate crime.

IV. ECONOMIC ANALYSIS OF LAW TOWARD PUNISHMEN FOR INSIDER TRADING DURING MERGERS AS CORPORATE CRIME IN INDONESIA

Generally, crime is an act that is detrimental to society, therefore, the action is reprehensible. Sutherland stressed that the main characteristic of crime is behavior which is prohibited by the state because it is an act that is detrimental to the state, and against that act, the state reacts with punishment as the ultimate effort.[25] Economic globalization and trade liberalization generally aim to eliminate all barriers in trade so that all business people are able to easily carry out trade activities in the global market.[26] The dynamism also created new breakthroughs in business, one of which is the formation of a corporation.

Corporations are inseparable from human needs. However, the increasingly significant role of the corporation has not developed in tune with the law, so regulations on corporations have become inadequate. This then encourages more complex crimes. Corporate crime is one of the crimes that has arisen with the progress of economic activities, technology, and trade liberalization. Corporate terminology is closely related to legal entities, as is known in the field of civil law. Corporation comes from the Latin word *corpus*, which means body. The body created consists of the *corpus*, which is its physical structure, and into which the law incorporated *animus* elements that give the body a personality. Since the legal entity is a legal creation, the termination is also regulated and determined by law.

The definition of corporation in the field of criminal law has expanded not only as a legal entity but also a non-legal entity. The definition of corporation in criminal law as *ius constituendum* can be found in the Perma Number 1 of 2016, which states: criminal acts committed by persons based on employment relations, or based on other legal relations, either acting individually or collectively for and on behalf of the corporation, inside or outside the corporation. Since the enactment of Law Number 1 of 2023, corporations can be imposed, with the management having functional roles, giving orders, holding control, and/or as the beneficial owner of the corporation under Article 49.

Corporate crime is part of white-collar crime, commonly known as organized crime or occupational crime. The characteristics of this corporate crime are structural and systematic.[27]

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[25] Andrew Weissmann & David Newman, "Rethinking Criminal Corporate Liability" (2007) 82:2 Indiana Law Journal at 437.

[26] Fajar Sugianto, Stevinell Mildova & Felicia Christina Simeon, *Increasing Economic Performance Through the Rule of Law in Indonesia: Law and Economics Perspective* (Atlantis Press, 2020) at 93.

[27] Agus Budianto, "The Corporate Crime as The Power of Crime in The Economic Justification" (2022) 28:4 SASI at 516.

Crimes committed by corporations are in the form of non-conventional crimes, which present problems, namely because of: (a) the difficulty in determining the victims clearly (the existence of abstract victims and collective victims), and (b) the challenge of carrying out criminal prosecutions to the perpetrators, among others, due to difficulties in the collection of evidence.[28]

Article 1 of Act Number 40 of 2007 defines a merger as a legal act carried out by one or more companies to merge with another existing company, which results in the merging of assets and liabilities of the receiving company so that the legal status of the merged company is thus terminated by law. Since the merger involves exchanging information, such information is materialistic.

Insider trading can be carried out by individuals or corporations. If done by individuals, then the difficulty is only in the burden of proof to impose a penalty, whether the merger is still ongoing or has ended. Whereas, if it is done by a corporation, the difficulty of proof for prosecution will be more severe, given the many legal vacancies against these crimes.

Crime and punishment are concepts that describe the actions that violate the law and the legal consequences for those actions. In terms of corporate crime, punishment can include fines, restitution, and judicial dissolution. These penalties are imposed generally to deter crime.

Under Article 10 of the Indonesia Penal Code, punishments in Indonesia include:

a. Basic punishment:
    1. Capital penalty;
    2. Imprisonment;
    3. Confinement;
    4. Fines.
b. Additional punishment:
    1. Revocation of certain rights;
    2. Deprivation or forfeiture of certain items;
    3. Announcement of judicial verdict.

Prohibition of insider trading, among others, aims to create a healthy capital market through the establishment of fair market prices. With insider trading, it

[28] Petter Gottschalk, "Victims of White-Collar Crime" (2013) 3:1 Matters of Russian and International Law at 98-99.

means that there is a leak of information that has not been disclosed to the public. Insider trading is prohibited because it endangers and causes losses to certain parties, including the danger of an efficient and fair market mechanism. A fair market is a market where all market members are treated equally and fairly.[29]

Rapid activity in the economic field, according to some people, causes the existing regulations to no longer be followed and accommodate legal needs, new rules are strongly needed in the field of economic law.[30] The economic analysis of law is one of the appropriate tools to analyze the efficiency level of a capital market, specifically in measuring punishment for insider trading in the merger process, given the focus on efficiency.

Insider trading is the practice of buying and selling securities from a company against the law by utilizing the benefits of confidential information regarding everything about the company concerned. This information is obtained from someone who, because of their position, has a close relationship with or at least access to the company. This includes those who own 10% or more of the shares issued by the issuers or securities issuers listed on the stock exchange, as well as directors or employees of issuers, including consultants who possess information about company issues.[31]

It seems that it will be very relevant to review the practice of the Capital Market Law through the application of good corporate governance (GCG) principles, which is carried out by the Financial Services Authority in the capital market as the most advanced corporate environment in the implementation of GCG.

GCG principles that prohibit insider trading need to be in line with both repressive and preventive measures. Insider trading is one of the criminal acts in the capital market that is quite difficult to prove because of its sophisticated modus operandi, for example, the modus operandi of misleading information by insider trading in the complex initial public offering (IPO) process. In addition, other constraints in proving insider trading as a criminal act include the difficulty

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[29] Richard A Posner, "An Economic Theory of the Criminal Law" (1985) 1193 Columbia Law Review at 133.

[30] Keith N Hylton, *Economic Theory of Criminal Law* (Rochester, NY: Social Science Research Network, 2019) at 88-89.

[31] David Pratt, "Economic Analysis" in *Energy Management Handbook*, 4th ed (River Publishers, 2018) at 19 & 23.

of tracking the flow of funds, foreign nominees, access to tax payments, and both natural and human resources.

Corporations as legal entities certainly have their own legal identity. The legal identity of a corporation or company is separate from the legal identity of its shareholders, directors, and other corporate organs. In civil law, it is clear that legal entities can conduct purchases and sales activities, make agreements and contracts with other parties, and sue or be sued in a court of justice.

However, the concept of corporate criminal liability is a matter that is still debatable. Many parties do not support the view that a corporation, in its intangible form, can commit a crime, has a criminal intent, and can bear criminal responsibility. In addition, the corporation can't appear with actual physicality in the courtroom and sit in the defendant's chair to undergo the judicial process.

In both the common law and civil law systems, it is very difficult to attribute a particular form of action (*actus reus* or guilty act) and prove the element of *mens rea* from an abstract entity such as a corporation. In Indonesia, even though the law can be used as a legal basis to impose criminal liability on corporations, the criminal court seems to be reluctant to acknowledge and use these regulations. This can be seen in certain cases of corporate crime in the court of justice and has an impact on the very few court decisions relating to corporate crime.

It is important and necessary to implement corporate criminal liability in the new Indonesian Criminal Code. The inclusion of these means that the form of criminal liability against the corporation is generally applicable to all offenses, including those outside the criminal code.[32]

It was stated that the formulation system used was based on the identification theory, not based on vicarious liability. This can be concluded from Article 47 of the Criminal Code Draft, which states that the criminal responsibility of corporate administrators is limited as long as the management has a functional position in the corporate organizational structure. Two experts argue that this still needs to be regulated to hold corporations accountable. Article 18 of the

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[32] I Dewa Made Suartha & Jared Ivory, "Corporate Crime Liability: Beyond Rule Reform on Indonesia Criminal Policy" (2024) 4:2 Focus Journal Law Review at 48.

Europe Criminal Law Convention on Corruption (1999) can be used as such guidelines:

> "...that legal persons can be held liable for the criminal offences … Committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on: a power of representation of the legal person; or an authority to decisions on behalf of the legal person; or an authority to exercise control within the legal person; as well as for involvement of such a natural person as accessory or instigator in the above-mentioned offences."

In corporations, the members of the board of directors and commissioners are vital organs in the legal entity and shall always function in fiduciary matters. The commissioners and directors have fiduciary positions in managing the company and ensuring that the proper mechanisms of the relationship are fair. According to the common law experience, the relationship can be based on the fiduciary duty theory. The fiduciary duty relationship is based on trust and confidence which, in this role, includes accuracy, good faith, and candor.[33]

Common law countries such as the United States have clear standards for determining whether a director can be held accountable for the actions taken, based on the standards of duty of loyalty and duty of care. The main obligation of the director is to the company as a whole, not to individuals or groups of shareholders.[34]

Similarly, the legal accountability for corporate crime in Indonesia includes corporations, management, and other individuals. Corporate itself can be held directly liable for corporate crime. As for management, the members of management are responsible for crimes committed by the corporation. The criteria for other individuals fall into any person who acts on behalf of the corporation, in the corporation's interest, or simply orders the crime can be held accountable.

Following the position of a director as trustee in a company, a director must not act recklessly in carrying out their duties (i.e., duty of care). In addition, in carrying

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33 Alexander Styhre, "What we talk about when we talk about fiduciary duties: the changing role of a legal theory concept in corporate governance studies" (2018) 13:2 Management & Organizational History at 134.

34 *Ibid.*

out duties, a director must not take advantage of the company for personal gain (duty of loyalty). Violations of these two principles of the fiduciary duty can cause directors to be held personally accountable for their legal actions by their shareholders and other parties.[35]

We will find the fiduciary duty principle in Indonesia's Company Law Article 98 paragraph (1), which states that the board of directors is fully responsible for managing the best interests and objectives of the company and representing the company both inside and outside the court. Meanwhile, Article 92 stipulates that each member of the board of directors must act in good faith and be fully responsible for carrying out duties for the interests and business of the company. Violations of this matter may cause the board of directors to take full personal responsibility if the person is guilty or negligent in carrying out their duties.

If we relate it to identification theory in the common law discourse as described above, mistakes made by members of the board of directors or other corporate officials can only be imposed on the corporation if it fulfills the following conditions: i) the actions taken by them are within the limits of duty or instructions given to them; ii) no fraud was committed against the company; iii) the actions were intended to produce profits to the corporation. In other words, if one or more of these conditions are not fulfilled, then the mistake cannot be borne by the corporation but must be borne personally.

Regarding actions of members of the board of directors or corporate officials taken for the benefit and profit of the corporation, the business judgment rule theory connects the linkage between genuine intention and business decision.[36]

The penalties that can be imposed on companies are:

1. The closure of all or part of the company being punished for a certain time;
2. Revocation of all or part of certain facilities that have been or can be obtained from the government by the company for a certain time; and
3. Company placement under forgiveness for a certain time.[37]

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35 Helen J Mussell, "Theorising the Fiduciary: Ontology and Ethics" (2023) 186:2 J Bus Ethics at 303.

36 Andrew Keay, "Wrongful Trading and the Liability of Company Directors: A Theoretical Perspective" (2006) 25:3 Legal Studies at 449-450.

37 Weissmann & Newman, *supra* note 25.

Based on this description, imprisonment and capital punishment cannot be imposed and imposed on corporations. Sanctions that can be imposed on corporations are:

1. Criminal fines;
2. Additional punishment in the form of an announcement of a court decision;
3. Additional punishment in the form of complete or partial closure of the company, administrative actions in the form of revoking all or part of certain facilities that have been or can be obtained by the company, and disciplinary action in the form of placement of companies under the authorities; and
4. Civil sanctions (compensation).

Looking at the Security Exchange Commissioner's guideline and policy,[38] for any person seeking compensation from the insider, a civil enforcement action could be brought against the insider by the SEC seeking:[39] (a) a monetary penalty of up to three times the profit gained or the loss avoided; (b) a cease-and-desist order; and (c) an order barring the insider from serving as an officer and director of any public company.

It is efficient to impose monetary penalties to enforce compliance with regulations, laws and other requirements, as well as to punish non-compliance, and deter future violations. A cease-and-deist order issued by an authorized agency is effective and can be a formal step that led to legal action. Finally, a legal remedy from a barring order that can be used to order compensation from the insider.

This compensation shall be paid by the insider for damages caused by a crime and can be awarded to a claimant in compensation for an injury or loss wrongfully inflicted. This form of remedy is most commonly referred to simply as "damages." The essence of damages is the payment of money as a release from civil liability.[40]

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[38] The U.S. Securities and Exchange Commission is an independent agency of the United States federal government, created in the aftermath of the Wall Street Crash of 1929. The primary purpose of the SEC is to enforce the law against market manipulation.

[39] Thomas, *supra* note 9.

[40] Felipe Sigrist & Solange Marin, "Morality, Justice, and Economic Theory of Crime: A Positive-Normative Analysis" (2022) 13:1 Modern Economy at 17.

V. IMPOSING SANCTIONS WITH ECONOMIC ANALYSIS OF LAW

The economic analysis of law is motivated by a variant of modern utilitarianism that emphasizes efficiency. It can be done in normative research that focuses more on developing formulas to achieve efficiency. Normative analysis asks how the law can be improved to better achieve the goal of efficiency. In achieving this, efficiency can be assessed by whether the existing legislation is adequate or not. One of the main exponents of utilitarianism is Richard Posner (1983, 1998), an American jurist and also one of the founders of the law and economics movement, who stated:

> "the efficient society is wealthier that the ineffective-that is what efficiency means..."[41]

Salbu also builds arguments on efficiency in his analysis of insider trading. He believes that insider trading makes the market less efficient. The reason is based on the belief that the market works less efficiently if exclusive access to information is confined to small and powerful entities. He argued that information must be disseminated among many competitors in atomistic competitions that have access to the same information to make the market efficient.[42]

In terms of insider trading, it can be resulted in a net profit for the community, which meets the elements of utilitarian ethics, although there are cases where insider trading remains unethical. In Chiarella's case, for example, the principle violated was the principle of trust in the relationship (fiduciary duty), which can also be categorized as misappropriation theory. Vincent Chiarella was an employee at a printing company that printed securities for trading and financial companies. He found out the contents of the printed securities that was to be kept confidential, particularly regarding the company's takeover plan. Chiarella utilized information of the takeover plan by buying shares of the company that would be taken over. When Chiarella bought these shares, the stock price was

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41 Posner, *supra* note 29.

42 Frank J Sensenbrenner & Margaret Ryznar, "The Law and Economics of Insider Trading" 2014 at 1158 & 1167.

still cheap. He made profit when the price went up by the time such information was announced to the public.

Chiarella was only subjected to sanctions to return losses due to his actions, on the basis that his position as an employee of a printing company held an indirect fiduciary duty to the company being taken over. According to the misappropriation theory, anyone is forbidden to use information that is not their property for personal interests or any sort of collective interests. His actions of utilizing confidential company documents and information for his financial gain abused the misappropriation theory.

The problem of applying the misappropriation theory to insider trading cases that have been examined in the judiciary in the United States is that it is not logically consistent. It is difficult to predict which trade will violate the law and which will not. There is a thin line between subjects who are insiders, tippees, and any other professionals who have a legal obligation not to use the information for personal gain.[43]

Proving insider trading cannot be done without using an economic approach and methods. Because insider trading is a criminal act committed by educated people with expertise in utilizing insider information and the ability to read market situations, these crimes can be categorized as white-collar crimes. Proving the occurrence of insider trading through economic approaches and methods provides a strong basis for ensnaring perpetrators under the insider trading provisions in the Capital Market Law.

Based on this argument, due to insider trading in the merger process causing inefficiency and a detrimental effect on the public, the punishment that can be imposed is not just limited to fines. Additional criminal punishments in the criminal code can be applied, with provisions that are more adapted to the capital market sector. The revocation of certain rights can be adjusted to revoke rights that make a corporation able to act as a legal subject, for example, operating permits. The intensity can also be adjusted in the duration of such revocation, either as temporary or absolute.

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[43] Karmel, *supra* note 2.

Furthermore, the additional punishment of confiscating certain items can be adjusted to the seizure of company assets valued equal to the public loss due to insider trading in the merger process. While additional penalties such as in the form of announcing the judges' decisions are more common to civil law, it does not rule out the possibility of being criminal. However, because the legal subject is a corporation, it is more efficient to have a verdict in the form of civil compensation.

VI. CONCLUSION

Characteristics of insider trading in the merger process involve three essential elements, namely, the existence of an insider, material information that has not been publicly announced, and the transaction based on material information. However, other insider trading characteristics are derived from the fiduciary duty theory and misappropriation theory, namely: the abuse of unpublished information, insiders and/or people who have access to the information, and illegal transactions serving personal and group interests. Insider trading in the merger process can also be done by both individuals and corporations as legal subjects. In the case of a corporation committing insider trading, it can be categorized as a corporate crime.

The criminalization of insider trading during the merger process as a corporate crime has not been definitively defined. However, using a comparative approach and economic analysis of law is useful in determining specific punishments or efficient punishments. The specific punishments resulting from this analysis are criminal fines and additional sanctions such as revocation of certain rights and permits. The intensity of revocation can also be adjusted, whether as a temporary or absolute measure.

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