

PROTECTION TOWARDS INVESTOR: ENFORCEMENT OF THE AUTHORITIES OF INDONESIAN FINANCIAL SERVICES AUTHORITY (OJK) DURING CAPITAL MARKET INTEGRATION

Created by: Muhammad Ikbal

Edited by: Rafisyachdi R & Hanif Abdul H

Abstract

The ASEAN Economic Community (AEC) was set up in 2003 with the objectives of creating a single market and production base, enhancing equitable economic development as well as facilitating the integration into the global economy. The AEC involves liberalization and facilitation of trade in goods, skilled labour, services, and investment, as well as protection and promotion of investment. The article outlines the AEC Blueprint actions in scope of globalization of investment and capital market. Free flows of investment and free flows of capital market urge countries in South East Asia to coordinate and to collaborate in securing the interest of public, and this leads to the importance of financial services authorities in ASEAN to prepare the mechanism of guarding the flows of investment. There is no exception, especially for Indonesian Financial Services Authority as one of the authorized body in capital market supervisory framework,, to enforce its authorities as supervisory body.

Keywords: ASEAN Economic Community, Capital Market Integration, and Financial Services Authority.

A. Background

According to article 1(3) of Law No. 8 Year 1995, capital market is an activity related to public offering and trade of securities, public company related to the securities it issues, as well as institutions and professions related to securities.¹ Furthermore, according to article 1(4) Law No. 8 Year 1995, capital market is a party which provide and organize systems for the meeting of parties in offering and purchasing securities between them.² In order to create a regular, efficient and fair market, and to protect public from any unlawful act in capital market, article 3 of

Law No. 8 Year 1995 is stated prior to the establishment of Capital Market Supervisory Body (BAPEPAM)³ which is since the establishment of Law No.21/2011 of Financial Services Authority, the role of BAPEPAM was replaced by Financial Services Authority (OJK).⁴

Globalization and inter-state agreement are developing capital market to a more dynamic pattern of market. The development of capital market into a more dynamic market leads to the freer flows of capital. This leads to states, especially developing states in regional scope, to develop their capital market into a

¹Law No.8/1995 of Capital Market.

²Ridwan Khairandy, *Hukum Pasar Modal I*, UII Press, Yogyakarta, 2010, p.5

³Law No.8/1995 of Capital Market, *Op.Cit.*

⁴<http://www.sahamok.com/pasar-modal/tugas-dan-fungsi-BAPEPAM-lk-pindah-ke-ojk/> , downloaded on January 6th, 2015.



regional-integrated sector that leads to the agenda of capital market integration.⁵

Capital Market Integration means a process that lead market to be more open so capital may flow freely. Capital Market Integration is one of the most important aspects of the global capital market. Capital market integration has a significant impact on economic growth. For example, a country with uniform tax laws and regulation usually has an integrated financial market because there are no circumstances where one's return will be reduced because of tax restrictions or different regulation.⁶

In the regional scope of ASEAN, the capital market integration contain 5 programs with which it can be achieved, as stated in AEC Blueprint, the first program to achieve Capital Market Harmonization in ASEAN in the areas of offering rules for debt securities, disclosure requirements and distribution rules. The second is to facilitate mutual recognition arrangement or agreement for the cross recognition of qualification and education and experience of market professionals. The third is to achieve greater flexibility in language and governing law requirements for securities issuance. The fourth is to enhance withholding tax structure, where possible, to promote the broadening of investor base in ASEAN debt issuance, and fifth is to facilitate market driven efforts to establish exchange and debt market linkages, including cross-border capital raising activities.⁷

Generally, capital market integration focuses to stimulate actions on capital market linkage, covers the areas of Initial Public Offering (IPO), process of offering rules for debt securities, disclosure requirements, and distribution rules. The actions are the requirement with which the ASEAN Capital Market Development and Integration can be achieved.⁸ However, any policy-making objective related to capital market shall refer to Law No. 8 Year 1995 on Capital Market as its reference; this also means the agenda of capital market integration under the ASEAN Economic Community (AEC) 2015. The problem rises when the agenda of globalization bears the legal system of a state involving in the agenda, which is Indonesia, in specific.⁹

The integration of capital market above will both theoretically and practically raise legal consequence, specifically in term of law enforcement. One that shall be noted, even though issuers are the party that need the capital the most, the actions against capital market disclosure principles are possible to happening. Furthermore, in that kind of actions, the integration may rise problems in coordinative scope between OJK with the financial supervisory institution in other states in regional ASEAN scope, especially in the case above or any case that appear in inter-state capital market transactions such as actions of capital market manipulations that occur not in national scope of Indonesia, which means that the actions

⁵The National Bureau of Economic Research, *Integration of the International Capital Markets: The Size of Government and Tax Coordination*, <http://www.nber.org/papers/w2863>, accessed on December 31st, 2014.

⁶Farlex Financial Dictionary, cited from <http://financial-dictionary.thefreedictionary.com/Integrated+Financial+Market>, on January 1st, 2014.

⁷Association of South East Asia Nation, *ASEAN Economic Community Blueprint*, <http://www.asean.org/archive/5187-10.pdf>, accessed on January 19th, 2015.

⁸*Ibid.*

⁹<http://ift.co.id/posts/ojk-ingin-kemenkeu-aktif-ajukan-revisi-uu-pasar-modal>, accessed on January 18th, 2015.

against the law occur outside the jurisdiction of OJK. This kind of action will cause loss to the citizens of Indonesia who actively join the capital market transaction in the regional ASEAN scope under the agenda of AEC 2015.

A. Main Study

1. The Legality of Financial Services Authority (OJK) to Enforce Its Authority Beyond National Border of Republic of Indonesia

Capital Market Supervisory Body (BAPEPAM), which is established under the authority of Financial Body (LK), was given authorities to supervise the capital market activities based on Law No.8/1995 of Capital Market.¹⁰ However, even though the authorities of BAPEPAM under Law No. 5 Year 1995 on Capital Market was broader than that of BAPEPAM under Law No. 52 Year 1976, there was still lack of authorities given by the government toward the BAPEPAM-LK. The lack of authorities could be seen through the absence of international collaboration and cooperation provided by the Law No. 8 Year 1995 for BABEPAM-LK to conduct its authorities beyond the national jurisdiction due to its status as a dependent authority limited its

functions in coordinative authority.¹¹

The importance for the financial supervisory institution to conduct broader international cooperation escalated quickly after the issuance of IOSCO MMOU in 2001 and the agreed agenda of ASEAN Exchange Linkage which was scheduled in frame with the agenda of ASEAN Economic Community 2015. The agenda of ASEAN Exchange Linkage which is in frame with AEC requiring international cooperation on capital market and securities exchange activity was considered too late by viewing the preceding international capital market coordination and collaboration that has been implemented in Europe through the independent authority of Europe Union (EU) called European Securities and Market Authority (ESMA) effectively established in 2010.¹²

The IOSCO MMOU is a multiparty agreement initiated in 2002, the signatory countries have agreed to exchange information and cooperate in fighting cross-border capital market misconduct.¹³ IOSCO MMOU was stipulated in article 7(a)¹⁴ considering the increasing international activity in the securities and derivatives markets, and the corresponding need for mutual cooperation and

¹⁰<http://www.repository.usu.ac.id/bitstream/123456789/17806/3/Chapter%20II.pdf> , accessed on May 20th, 2015.

¹¹http://www.bapepam.go.id/pasar_modal/regulasi_pm/peraturan_pm/IX/IX.I.5.pdf, accessed on May 20th, 2015.

¹²The National Bureau of Economic Research, *Op Cit*, accessed on May 20th, 2015.

¹³Janet Austin, *IOSCO'S Multilateral Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information*, <http://link.springer.com/article/10.1007%2F978-94-012-9180-6> , accessed on May 20th, 2015.

¹⁴Article 7 sections (a) of IOSCO MMOU Year 2001

consultation among IOSCO Members to ensure compliance with, and enforcement of, their securities and derivatives laws and regulations, as well as desiring to provide one another with the fullest mutual assistance possible to facilitate the performance of the functions with which they are entrusted within countries respective jurisdictions to enforce or secure compliance with countries capital market laws and regulations.¹⁵

BAPEPAM-LK wasn't able to achieve benefits from Article 7(a) of IOSCO MMOU due to the vacuum of authorities given by the Law No. 8 Year 1995 for the BAPEPAM-LK to conduct international collaboration and cooperation in the standard of IOSCO.¹⁶ There were at least two major obstacles that Indonesia had to overcome to become eligible as a signatory country. First, BAPEPAM-LK, as the then capital market regulator, did not comply with the requirement of having independent institutional status.¹⁷ Second, BAPEPAM-LK did not have the authority to obtain banking records and international cooperation authority, especially for law enforcement purposes.¹⁸

After all the lacks that occurred in Law No. 8 Year 1995

on Capital Market especially matters related to international cooperation and lack of authority in the body of BAPEPAM-LK the government decided to establish a new body namely OJK. Law No. 21 Year 2011 on Financial Service Authority is the law which leads to the establishment of OJK and ends the existence of BAPEPAM-LK. The replacement of authority could be seen in the Chapter VIII on Transitional Provision Article 55 (1) of Law No. 21 Year 2011.¹⁹

As for the status of the institution, OJK is no longer dependent as what happened to BAPEPAM-LK whereas OJK undertakes its function and authority based on the principle of independency, it means that the Financial Service Authority is independent during making the decision and implementing the function, assignment, and authority, by keep in accordance with the applicable law and regulation, even though OJK has to deliver task report to Audit Board of Republic of Indonesia and the House of Representative.²⁰ Another important transformation stipulated in Law No. 21 Year 2011 is the expansion of authority given by the law to OJK, whereas the financial authority is capable to conduct international collaboration and

¹⁵Jr. Sommer, IOSCO: Its Mission and Achievement, <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1441&context=njilb>, accessed on May 20th, 2015.

¹⁶BAPEPAM, *Financial Sector Assessment Program Republic of Indonesia Implementation of the IOSCO Objectives and Principles of Securities Regulation*, <http://www.bapepam.go.id/bapepamlk/others/IOSCO.pdf>, accessed on May 20th, 2015.

¹⁷International Monetary Fund Report, *Indonesia: Implementation of IOSCO Objectives and Principles of Securities Regulation*, IMF, Washington D.C., 2012.

¹⁸BAPEPAM, *Op.Cit.*

¹⁹Law No. 21 Year 2011 on Financial Services Authority, article 55 section (1).

²⁰Law No. 21 Year 2011 on Financial Services Authority, Article 1 section (a).

cooperation with other financial institutions abroad based on Article 47 regarding to International Relations of Law No.21 Year 2011.²¹ Therefore OJK has capability to conduct international collaboration and cooperation with ASEAN states financial authority due to OJK has been fulfils the requirement of Article 7(a) IOSCO MMOU.

It is very clear to conclude that the Law No. 21 Year 2011 provides transformation for the financial service authority to conduct its duties and responsibilities in the field of capital market. The transformation can be seen through the changing of status and expansion of authority given by the law toward OJK. Therefore, the Indonesian financial service authority is now capable to conduct international cooperation which extends the authority to supervise capital market activities by using IOSCO MMOU as its guidance to conduct agreement in international collaboration and cooperation in capital market activities. Law No 21 of 2011 on the Financial Service Authority brought the OJK into being, giving it authority to supervise the financial sectors and capital markets. The OJK authority transfer is significant because it has broader authority to coordinate with more regulating agencies and other financial institutions. It has brought positive changes, especially by

integrating the regulatory framework within the sectors.

B. The Enforcement of the Supervisory Authority of OJK during South East Asia's Capital Market Integration in Prevention of Capital Market Crimes in Capital Market and Against Investor

The mandate for OJK to conduct the duties is stated in Law No. 21 Year 2011 on Financial Service Authority (OJK) as written in the consideration of the establishment of the law itself:

It is required the financial service authority of which has function, assignment, and control authority and supervision on financial activity in the financial service in integrated, independent, and accountable.²²

The national financial service authority is also given mandate to conduct supervision and investigation towards securities exchange activities beyond the national border of Republic of Indonesia through coordination with the national financial service institution of other countries. This is in accordance with the Article 47 section (1) of Law No. 21 Year 2011 on Financial Services Authority which stated:²³

- 1) OJK could make cooperation with the Supervisory authority on the Financial Service Institution in other countries as well international organizations and other international institutions such as in the fields and/ or activities as follow:
 - a. Development institutional capability, such as human resources training in the field of control and

²¹Law No. 21 Year 2011 on Financial Services Authority, Article 47.

²²<http://www.oecd.org/finance/financial-markets/49703438.pdf> ,

accessed on May 21st, 2015

²³Law No. 21 Year 2011 on Financial Services Authority, *Op Cit*.

supervision of Financial Services Institution;

- b. Sharing information; and
- c. Cooperation in the context of examination and investigation as well precaution crime in the sector of finance.

As for the crimes stated in Article 47 Section (1) can be divided into three main types of crimes, those are:²⁴

1. Fraud, defined as an act of making incorrect statements about material facts or not disclose material facts that the statements made is not misleading as to the circumstances that occurred at the time the statement was made with the intention to give benefit or avoid loss to themselves or others or with the purpose of influencing others to buy or sell securities;
2. Market manipulation, defined as actions taken by whoever party directly or indirectly for the purpose of creating a false or misleading information regarding trade, condition of the market, or the price of securities in a stock exchange; and
3. Insider Trading, defined as the trading of a public company's stock or other securities (such as bonds or stock options) by individuals with access to nonpublic information about the company. In various countries, trading based on insider information is illegal. This is because it is seen as unfair to other investors who do not have access to the information as the investor with insider information could potentially

make far larger profits that a typical investor could not make.

The article 47 section (1) of Law No. 21 Year 2011 above implies that the OJK has capability to conduct international collaboration and cooperation with other state's financial authority in South East Asia. In other scope of authorities, the Financial Services Authority (OJK) launched a corporate governance map directions Indonesia or Good Corporate Governance (GCG). The purpose of the launching of GCG is for public companies in Indonesia to be aligned with companies in the ASEAN region. To support this, regulation is required as a legal basis. Therefore, OJK has prepared 33 codes of conduct that must be followed by public companies and issuers. The legal basis for OJK to protect the interest of Indonesian investor by conducting collaboration and coordination with other financial service institutions within the territory of South East Asia is the ASEAN Comprehensive Investment Agreement (ACIA) taking effect in 2012. The application of ACIA is important for investment protection and dispute resolution, which is highly relevant for the business community.

B. Conclusion

The legal basis for OJK in the implementation of ASEAN Economic Community 2015 to protect the interest of Indonesian investor by conducting collaboration and coordination with other financial service institutions within the territory of South East Asia is the ASEAN Comprehensive Investment Agreement (ACIA) taking effect in 2012

²⁴Ahmed Aliyu, Managing Capital Market Crimes: the Role of Nigeria's Securities And Exchange Commission,

<http://iosrjournals.org/iosr-jhss/papers/Vol19-issue11/Version-8/K0191185663.pdf> , accessed on May 21st, 2015.

In the ASEAN framework, investment protection has been in the forefront since the 1987 Agreement for the Promotion and Protection of investments which evolved into ACIA. Article 5 of ACIA shows that there is one important thing to be taken into account in order to enforce cooperation and collaboration in supervising and investigating capital market activities between OJK and the financial authority in other SEA's Countries

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