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Reconstruction of Over-the-Counter Transaction Settings Based on Legal Certainty

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Abstract

OTC (Over-the-Counter) Transaction has become one of the alternative choices that greatly benefits to the parties. Problems then arise when the law has been formed by the competent authority, but it creates legal uncertainty due to the regulations that regulate the same things but different contents. The OTC Transactions are regulated in Financial Services Authority Regulation Number 22/POJK.04/2019 on Securities Transactions. It is stated that the OTC are included in securities transactions, of which transactions can be done both in the primary and secondary markets. However, the Regulation Number 8 of 1995 does not regulate the OTC transactions. This can lead to the legal uncertainty towards the OTC transaction agents since there are more than one regulation governing the same problem. In addition, a reconstruction is needed for legal protection and dispute resolution related to the OTC transactions.

Keywords: OTC transactions; regulatory reconstruction; legal certainty.

Abstrak

Transaksi OTC menjadi salah satu pilihan alternatif yang sangat memberikan keuntungan bagi para pihak. Permasalahan kemudian muncul ketika hukum telah dibentuk oleh lembaga yang berwenang, namun menimbulkan ketidakpastian hukum karena adanya peraturan yang mengatur hal yang sama namun isinya berbeda-beda. Transaksi OTC diatur di dalam Peraturan Otoritas Jasa Keuangan Nomor 22/POJK.04/2019 Tentang Transaksi Efek. Dalam POJK 22/2019, disebutkan bahwa transaksi OTC termasuk ke dalam transaksi efek dimana transaksi efek dapat dilakukan baik di pasar perdana maupun di pasar sekunder. Namun Undang-Undang Nomor 8 Tahun 1995 Tentang Pasar Modal tidak mengatur mengenai transaksi OTC. Sebagai acuan dalam membentuk peraturan di bawahnya, UUPM tidak lengkap dalam mengatur mengenai ketentuan pasar modal di Indonesia. Hal ini dapat menimbulkan ketidakpastian hukum terhadap para pelaku transaksi OTC, karena adanya lebih dari satu peraturan yang mengatur satu permasalahan yang sama. Selain itu rekonstruksi diperlukan pada perlindungan hukum dan penyelesaian sengketa terkait transaksi OTC.

Kata Kunci : Transaksi OTC; rekonstruksi pengaturan; kepastian hukum.

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Introduction

Securities transactions in the secondary market are secondary securities transactions after the securities transactions in the primary market. The securities transactions in the primary market or known as Initial Public Offering (IPO) is a place where the issuers (public companies that sell securities) trade the securities offered to the public before they are listed on the stock exchange to be offered back to the public. After going through the IPO process, unsold securities can be sold in the secondary market. One of the ways is through the transactions in over-the-counter market.

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The over-the-counter transactions are transactions conducted on the secondary market, in which it does not use the stock exchange system and it is not subject to provisions made by the stock exchange. According to IOSCO (International Organizations of Securities Commissions), the OTC is a market that generally carries out bilateral and private negotiation agreements, of which agreements give flexibility to the parties to agree on the agreed risks (Emerging Markets Committee of the International Organization of Securities Commission, 2010). The OTC gives the parties freedom to determine their own clauses in the securities trading agreement, by taking the risks that will come in the future. The clauses in the trading agreement must be based on the agreement of the parties and also the basic conditions existing in the agreement of each country. However, even though the parties are free to determine the clauses in the agreement, the parties still need an accurate legal certainty in making the over-the-counter transactions.

OTC transactions in Indonesia are divided into two types, which are transactions by directly negotiating between the parties and the transactions carried out through the alternative market providers (PPA). According to Financial services authority regulation No 22/POJK.04/2019 on Securities Transactions article 22, OTC transactions are carried out directly by conducting the securities trading between the parties without going through an alternative market, entering into a sale and purchase agreement of securities between the parties and the agreement will be binding when the parties have rationed, there has been an agreement between the parties, agreement between the parties, or at the time determined by the competent judicial council or statutory regulations. Then, the securities transactions carried out through the alternative organizer markets may result in two binding agreements between the parties. The first is when the PPA only acts as an intermediary between the parties that conducting the transaction. At this time, the binding agreement is between the parties. The second is when the PPA is the opposite of the transaction from its customer or when it becomes the opposite of the transaction of the other party based on the agreement with the customer. In this second method, according to Financial services authority regulation No 22/POJK.04/2019 on Securities Transactions article 26 paragraph (2), the customer is only bound to the PPA and does not bound to the other party that is his/her opponent.

The OTC Transaction has become one of the alternatives that greatly benefits to the parties. This is not based on all of the securities issued by the issuers, in which it can be traded on the stock exchange because the securities are not listed (Rahmah, 2019). The administration and costs that are quite burdensome for the issuers, especially the issuers who have just entered into a g-public company, are the main reasons for the issuers to choose the OTC method rather than selling their securities on the stock exchange. In addition, the issuers usually choose the OTC transactions to reduce the risk of currency fluctuations, commodity price volatility, fluctuations in fuel prices, changes in the interest rates, and others (Rahmah, 2019). The values that go up and down can affect the price of the securities which certainly do not provide any certainty of economic value to the issuer that requires a definite cost for its business activities. The OTC can provide more certainty

since the price agreements are carried out between the parties to the transaction. Therefore, the development of this OTC transaction should obtain a clear legal certainty so that the OTC transactions can be considered as safe by the agents of this transaction.

A legal certainty is one of the objectives of the law. The law provides about what is permissible and what is not. There are clear boundaries on the law regarding to the rights and obligations of the legal subjects. Analyzing a legal certainty, it must be seen whether there are written laws that are used to regulate or not. John Austin said that the law must be certain and formed as a command of sovereign, made by the agency assigned and has the authority to make the law (Hadi, 2017). A legal certainty will be achieved when the authoritative institution forms the law to achieve the legal certainty. Hence, if it is connected with the legal certainty regarding to the over-the-counter transactions, the institution that has the authority to make the law must form a law to provide a legal certainty to the people who carry out these transactions.

The problems then arise when the law or regulation has been formed by the competent authority, but it creates legal uncertainty due to the regulations governing the same thing but different contents. The OTC Transactions are regulated in Financial Services Authority Regulation Number 22/POJK.04/2019 on Securities Transactions (hereinafter referred to as POJK 22/2019). In article 6 paragraph 1 of POJK 22/2019, it is stated that OTC transactions are included in the securities transactions, of which transactions can be carried out both in the primary market and in the secondary market. However, the Regulation Number 8 of 1995 on Capital Market (hereinafter referred to as UUPM) does not regulate OTC transactions. As a reference in establishing the regulations below, the Capital Market Regulation is incomplete in regulating the capital market regulations in Indonesia. This can lead to the legal uncertainty for the OTC transaction agents since there are more than one regulation that governing the same problem.

The Capital Market Regulation regulates several matters regarding the legal certainty of the OTC transactions. A study conducted by Meisy Kartika Putri Sianturi, entitled "The Principle of Openness as Investor Protection in the Transactions Outside of the Exchange as the Transactions in the Capital Market in Indonesia", delivered an overview of the principle of openness in providing the legal protection to investors, especially in conducting the OTC transactions. The study conducted in 2014 used Bapepam Regulation No. III. No. A.10 as a reference for managing the transactions outside the stock exchange. Meisy said that the regulation of the transactions outside the stock exchange in the Bapepam regulation did not regulate completely and only mentioned a little about the transactions outside the stock exchange. Consequently, this provides uncertainty for off-exchange transaction agents (Sianturi, et.al., 2014).

Departing from the description in this background, it can be concluded that there is a difference between this scientific paper and other scientific papers. The fundamental difference is that this paper emphasizes on how to reconstruct over-the-counter transactions to obtain definite legal protection. The researcher used the latest regulations

governing and over-the-counter transactions with the Capital Market Regulation to obtain how the legal certainty will be obtained for the over-the-counter transaction agents.

Research Problems

The introduction section has shown some problems that can be analyze and compared for future methods of securities truncations in Indonesia. This paper questions why legal certainty is very important in over the counter transaction in Indonesia and how Indonesia should reconstruct the over-the-counter transaction arrangements based on the legal certainty. The answer of these questions would show the readers that legal certainty would make over-the-counter transaction better for every party in the arrangement. The result is expected to make a good input for the Regulation Number 8 of 1995 on Capital Market in finding comprehensive law that accommodates legal certainty and protects every party from issues that leads to uncertainty in law.

Research Method

The focus conducted by the researcher in this legal study was the study of the principles of law and systematics of law. This was because the researcher wanted to analyze the legal principles in the law regarding to the capital markets, in which it was related to the reconstruction of over-the-counter transactions based on the legal certainty. After that, the researcher would systematically link the laws that could be used to relate over-the-counter transaction reconstruction based on the legal certainty. To find the law, the researcher used normative juridical study. Law in normative approach is assumed as autonomous, so its validity is determined by the law itself, not by the factors outside the law (Barus, 2013). Normative juridical study can be seen as a research that approach law as it is.

In conducting this study, the researcher used the statutory approach. The statutory approach is an approach that uses a review and study of rules and the regulations that can be used and studied with the legal issues existing in the background of this study. The researcher would like to review the legislation governing, both directly and indirectly, related to how the reconstruction of over-the-counter transactions based on the legal certainty.

The types of the legal materials used by the researcher included the primary, secondary, and tertiary legal materials. The primary legal materials of this paper were regulations from acts and financial services authority regulations. The secondary legal materials were in the form of legal material which covered up the legal literature, legal journals, and researches related to the subject of the study, legal papers, internet articles and so on. Those secondary legal materials were used to explain and support the primary legal materials as the main references. Then, tertiary legal materials consisted of materials that contain instructions on primary legal materials and secondary legal materials or generally used as reference materials in the field of law, consisting of abstract legislation, legal encyclopedia, and legal dictionary.

The analysis techniques of the legal material used by the researcher to descriptively and analytically examine the problems were grammatical and systematic interpretation. The grammatical interpretation is a method of interpreting the law that refers to the language contained in the rules. The language used in the articles of the legislation was reviewed and analyzed to find out the meaning and purpose of the legislation. Whereas the systematic interpretation is a method of interpreting the law that refers to the systematic between laws and regulations. The harmonization between laws and regulations was reviewed and analyzed to solve the problems that exist in the legal issues of this study. Then, the data collection technique used by the researcher was literature review which were conducted by analyzing the laws and regulations, books, and scientific papers related to this study.

Discussion

The Importance of Legal Certainty in Over-the-Counter Transactions in Indonesia

Law is the work of human thought which is used as an enforcement of human dignity. The law is formed as a representation of good values and then applied to the society in order to get the fairest possible protection. When related to the economic aspects, law must be able to facilitate Indonesian people to gain economic benefits. Therefore, the law as a medium that can provide protection for the community's rights in the economic sector must be formed into regulations that have certainty, so that the people know their rights in the economic sector.

Legal certainty provides knowledge to the public to carry out what is permitted by law. The community will be able to identify which activities are allowed by the law and which activities are prohibited by the law. By prioritizing the legal certainty in all regulations in Indonesia, it is expected that the communities will live in order while enjoying their rights and avoiding the violation to human rights.

The legal certainty is always identified with the prevailing laws and regulations. John Austin, a philosopher who adheres to the flow of legal positivism, postulated that the source of law comes from the highest authority. The highest authority in question is the power that governs an area that is sovereignly regulated. The law only has an attachment to positive law and other laws without noticing to the good and bad (Sudiyono and Suswoto, 2018). Hence, the legal positivism will provide legal certainty to the public and will be able to enjoy its rights.

Legal positivism aims to identify the law as it is. It was made for critics of the weaknesses of natural law that prioritize human morality (Halim, 2008) and does not show what is law as it is. The statement means that legal positivism sees laws as the laws that tells people what they may do and what they must do or what not. It stricts to the point and does not tell people uncertainty things. This also known as the normative law.

Normative law is known in various types. It includes religious law, moral law, customary law, and law of etiquette. Legal positivist offers theories reflecting the legal sense from laws in the non-legal sense. Law will be legal if it is made or recognized by the

established authority. It is because legal positivist believes that law must give people what they call as legal certainty and legal authority from what they believe could give that.

Another legal positivist suggested different theories for what is the meaning of positive law. Hans Kelsen, an Austrian jurist, set a positivist theory called the pure theory of law. The pure theory of law, Kelsen argued that legal rule and moral rule are distinct, although they may often coincide in content (Ratnapala, 2009). For an example, a norm saying “do not steal” is both moral rule and legal rule. Moral rule is moral because of its content. Even without a legal rule, people should not steal from other people. It is a general principle in society that stealing is prohibited. In other hand, the legal rule does not depend on its content, but only because it has been constituted in a legal way of a definite procedure and a definite rule of law (Kelsen, 1935). Conversely, moral rule will be a law if it has been made according to the established procedures and criteria of validity.

Jeremy Bentham is an English jurist and philosopher who introduced the groundwork for a theory of law expressed as will the sovereign. Bentham said that a system of law that comes from the clearly expressed legislative will the sovereign produces clearer and more certain laws than the rules generated by the common law system. Bentham came from England that widely-known adopt the common law system, a system of law that is not a creation of political sovereignty. He then regarded common law system authorless and uncodified body of rules that made English law as being unworthy of the name of law (Ratnapala, 2009). Bentham wrote his own definition of law: “a law is an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of person, who in the case in question are or are supposed to be subject to his power (Bentham, 1970a).” Sovereign by Bentham view is limited by “transcendent laws”, which he meant constitutional rules (Bentham, 1970a).

Law that was made by sovereign not always be law according to Bentham. The content of the law may be established by the sovereign by conception or adoption (Bentham, 1970a). Conception is where the substance of the law is conceived by the sovereign itself and adoption is where the sovereign confers validity on a rule made by another person (Ratnapala, 2009). Conception or adoption must take the legislative forms to fulfill law as it is commonly understood by Bentham. Administrative orders, military commands, and judicial decisions are not laws by Bentham’s view. So, according to Bentham, law must be made by the rightful authority in legislative forms to make law has the power to apply in society. In Indonesia, this authority is held by house of representative and some independent bodies that have authority in certain issues.

John Austin is another legal positivist who has known by his command theory of law. Austin delivers his theory to society that not all norms are proper laws. His theory demands that laws must be authoritatively established by God or by the sovereign. Determinate sovereign results in positive law. According to Austin, positive law has three elements of concept of law: a political sovereign, command, and sanction. Without these

three elements, law will be just a positive morality in society. Positive morality is a moral to be kind to fellow human beings, to practice temperance, to give charity and generally to be virtuous (Ratnapala, 2009).

Austin wrote about sovereign: “or the notions of sovereignty and independent political society may be expressed concisely thus. -if a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of given society, that determinate superior is sovereign in that society, and the society is a society political and independent (Austin, 1995). According to this, sovereign possesses five essential attributes:

1. The sovereign is a determinate human superior. It may consist of a single person, like in an absolute monarchy, or a group of persons, like house of representative.
 2. The bulk of the people habitually obey the sovereign. It is an indispensable condition of a stable and functioning society that its rules are observed by most of the members most of the time.
 3. The sovereign is not in the habit of obedience to any other human superior. For example, government of province within a federation, will not be sovereign, because its authority is subject to the will of a superior.
 4. The power of sovereign cannot be legally limited. The power of sovereign cannot be limited by law because if it is limited, it is due to a superior power that can impose limits (Ratnapala, 2009). So, in this case, the superior power is the real sovereign.
 5. Sovereignty is indivisible. By Austin’s view, the notion of divided is absurd. He said that judicial and executive actions are simply different ways of executing sovereign commands. Officials and judges are mere delegates of the legislature.
1. The command of sovereign results in positive law. Command is an imperative that creates a duty by the presence of a sanction.

A command involves a desire conceived by a rational being that another rational being shall do or forbear, an evil in case of noncompliance and intimation of the wish by the words or other signs (Austin, 1995). Command cannot be separated from duty and sanction. They are one aspect of Austin’s positive law event. In any case, command creates positive law. From all these legal positivists, we may now that the purpose of their theories is to make legal certainty among the society. They argued a lot about how law should separate from moral value. Law must be seen as it is, nothing more, nothing less. From their statements, they want to achieve legal certainty.

One of the benefits obtained from the legal certainty is the existence of clear legal protection. The legal protection is a protection of community’s rights, both communally and individually, given by the authorities through the law. One of the purposes of law is to seek justice among the society; so legal protection is a tool of law to find justice (Rachmadini, 2019). The laws and regulations are made in accordance with the essentially, not in favor of any party and formed proportionally. The legal protection will provide protection both preventive and repressive. The preventive legal protection is legal protection that prevents future disputes (Muharam, 2018). The state provides

protection through the law for its citizens to avoid misfortune due to their actions. Then through the law, the state regulates how people as individuals and communities exercise their rights without worrying about their rights being disturbed by the others. The same applies to people who make agreements. The agreement clauses can be formed to provide protection for those who promise that the parties can accept their rights without violating other's rights. Unlike the case with the preventive legal protection, the repressive legal protection is legal protection that aims to resolve the disputes that have already occurred as a final action (Muharam, 2018). The laws formed either by the state or by the agreements provide legal protection that can be used when the disputes have to be resolved. The settlement is done legally so that the community does not do undesirable things, in which it can cause excessive losses. The legal settlement becomes a settlement that must be exercised and the results must be accepted by all parties.

The law enforcement in the form of legal protection in the economic and business sectors, especially the capital market, cannot be avoided from the legal aspects of the company, especially concerning limited liability companies. It is because legal protection in the capital market involves the capital market actors especially the issuers, investors and supporting institutions of capital market activities in which the parties are dominated by the legal subjects in the form of legal entities such as limited liability companies. On the investors side, legal protection is important because it guarantees the investor to invest their money in Indonesia. It goes on the same line with the characteristics of investment which come to the place where it can give optimal profit to the investor (Abubakar & Hindayani, 2019).

The weakness of the OTC transaction arrangements that can be seen is its inconsistency in the laws and regulations of Indonesia. The OTC transactions are regulated in POJK 22/2019 which regulates about the securities transactions. According to article 1 number 2 POJK 22/2019, the securities transactions are all forms of activities or contracts in terms of obtaining, releasing or using securities that result in a transfer of ownership or do not result in a transfer of ownership. The securities transactions can be carried out either through a stock exchange or without going through a stock exchange, which is usually performed through an alternative market providers or direct negotiation between parties. This provision becomes a reference regarding to what is meant as OTC transaction in Indonesia. Whereas the Capital Market Regulation as the main regulation of the capital market activities in Indonesia does not clearly regulate the form of OTC transactions. In the Capital Market Regulation in article 1 number 13 only regulates the definition of the capital market, where the capital market is explained as an activity involving public offerings and securities trading as well as public companies and professions and supporting institutions.

Indonesia needs consistent arrangements in managing the over-the-counter transactions. The OTC transaction is one of the solutions for the transactions in the capital market in Indonesia for the issuers. Easy requirements and low cost compared to the transactions through the stock exchange makes the OTC transactions very helpful

for the issuers who want to find out additional alternative funds. To be able to provide benefits to the OTC transaction agents, it is necessary to have a legal certainty that sets the limit between rights and obligations of the OTC transaction agents. Meanwhile, the Capital Market Regulation which is a reference for the capital market transactions in Indonesia does not regulate the OTC transactions at all. When viewed from the articles contained therein, the Capital Market Regulation (UUPM) regulates more about the transactions conducted on the stock exchange. This can be seen from the provisions governing the institution of the stock exchange, the transaction process, to the rights and obligations of the stock exchange. Although the provisions of the Capital Market Regulation referred to as the capital market are all forms of the transactions on public offerings and securities trading, but this does not provide clarity on how the over-the-counter transactions should be carried out in the Capital Market Regulation (UUPM).

The importance of legal certainty in the hierarchy of laws and regulations in regulating the capital market activities requires that Indonesia must reconstruct the UUPM in Indonesia. According to act no 12 of 2011 concerning establishment of regulation, in article 10 paragraph (1), the material content contained therein is a further regulation of the provisions of the 1945 Constitution of the Republic of Indonesia and the fulfillment of the legal needs of the community. These two things make the law as a legal regulation that governs the basic provisions in the capital market activities and especially as an extension of the Indonesian state constitution, known in theory as Grundnorm. According to Hans Kelsen, Grundnorm is not part of positive law, but as a basic norm, the highest norm that is considered as authority norms, a juridico-logical constitution, underlying legality of positive law (Wardiono, 2014). Grundnorm theory provides an illustration of the importance of society's values in law. Grundnorm is a desired value which comes from an objectified need (Samekto, 2019). Grundnorm never change and obligatory for making a positive law. Thus, if it is linked in Indonesia, then as an extension of Grundnorm, all of the rules of community must be regulated first in the law, so that it becomes a positive law that contains basic norms. In this case, the basic norms are within the capital market, especially the over-the-counter transaction. After regulated in the law, then it is regulated in the Financial Service Authority (OJK) regulations, as the implementing regulations of the law that already contains the basic norms of the capital market regulations. Thus, a legal certainty is formed due to the harmonious hierarchy of the regulations regarding the capital market in Indonesia.

A study conducted by Richard A. Posner in the Economic Analysis of Law described how the Capital Market Regulation should regulate the capital market activities in Indonesia. The Economic Analysis of Law theory from Posner has various heuristic, descriptive, and normative aspects in explaining the economic analysis of law. From the heuristic aspect, this theory shows the underlying unity in legal doctrine and institutions. From descriptive aspect, this theory identifies the economic causes of legal changes; while in the normative aspect, this theory provides direction to judges and policy makers in regulating behavior through the law (Mundzir, Hudiarini, and Muslim, 2016). Viewed

from a descriptive aspect, the Capital Market Regulation has an effect on economic activities in the capital market. The securities transactions carried out by the capital market players are influenced by the provisions that are regulated mainly in the Capital Market Regulation. Thus, the provisions in the Capital Market Regulation can affect the economic aspects of the community, especially in economic activities in the capital market. While in the normative aspect, this theory provides an analysis for policy makers when forming a new policy or regulation. A very long provisions in the Capital Market Regulation make the law cannot keep up with the very rapid development of the community. Consequently, the economic analysis of law theory provides assistance to the policy makers to regulate behavior through the law. When the OTC transactions are regulated and reconstructed in the Capital Market Regulation, the OTC transactions will provide economic benefits to the community and also to the country.

Reconstruction of Over-the-Counter Transaction Arrangements Based on the Legal Certainty

In legal norm, law that contains reason can make people's mindset change to be the way like the law want to be (Wagiman, 2016). For example, in modern era, legal certainty is very important in many aspects of people's life. It is to ensure which one is right and which one is obligation. People's mindset has changed by law that contains reason of legal certainty, that legal certainty is needed to know what is the difference between right and obligation. As the over-the-counter transaction, Indonesia currently requires the reconstruction of the over-the-counter transaction arrangements that are in accordance with the legal certainty. The over-the-counter transaction arrangements that are still overlapping cause a conflict on the legal norms between the regulations governing the OTC transactions. The UUPM as a basic legal norm does not explicitly regulate how the OTC transactions should be. Whereas the POJK 22/2019 regulates it but without based on the provisions of the law in the capital market which clearly regulates the over-the-counter transactions. Therefore, harmonization is needed by reconstructing the OTC transaction arrangements in accordance with the hierarchy of laws and regulations in Indonesia, which is based on community legal interests.

The harmonization is needed to take legal actions in certain ways. In Indonesia, capital market is supervised by financial service authority knows as Otoritas Jasa Keuangan or OJK. OJK was formed to respond development of capital market that was influenced by information system, communication system, and technology in modern era (Pradipto, et.al., 2019). On the other hand, in supervising capital market, industry can also do it by applying good corporate governance principle. In fact, the problems in capital market is mostly caused by lack of good corporate governance principle in the industry itself (Wowor, 2016). However, without the harmonization on legal actions of capital market, especially on OTC transaction, OJK and industrial sector cannot take legal actions in a certain way.

The reconstruction that needs to be carried out at the first place is the

reconstruction about the legal protection for the investors. Investor is one of the parties in the capital market that provides funds to the issuers in the capital market. The funds given by the investors to the issuer are not free funds, but funds that in the future, the investors will get a return in the form of profits. The investors will pay attention to how the law can protect it by considering the positive laws regarding the capital market. Legal certainty and having no multiple interpretations will provide a sense of security for the investors in investing their capital in an issuer. When the investors have certainty about their rights, the purpose of the Capital Market Regulation is the implementation of good capital market activities, in which it can be achieved and can provide economic benefits for the capital market agents.

The investors in the capital market can be linked as a consumer. It means that consumers are not limited to people who buy things. This explanation emphasizes that consumer does not only mean the end-user, but it is adjusted to the placement of the status of the consumer in a transaction activity (Dimiyanti, 2014). Therefore, if the consumers are placed in the capital market activities, then the consumers can also be interpreted as the investors. It is because the investors receive "goods" from the issuers in the form of securities and the investors are usually given more protection such as a guarantee from the issuer, so that the investors believe that their invested assets are safe.

The legal protection to the investors can begin with providing true and not misleading information. The consequences of this legal protection must be in accordance with the principle of full disclosure, for every investment decision carries a high risk, the issuer and supporting professions in the capital market have obligations to be responsible for the accuracy of the data and the completeness of the information (Nilasari, 2011). This is also the consequence of the transparent regulation in the Capital Market Regulation. The principle of openness gives a direction to every capital market participant who is subject to the Capital Market Regulation to inform the public about the information material or its effects, so that the investors have the right information in making securities transactions. Consequently, in OTC transactions, the party offering the securities must openly provide the information to the public who want to invest without going through the exchange system clearly. However, in the Capital Market Regulation, it is not clearly regulated what can be called as an action that is considered in accordance with the principle of the openness.

The principle of openness in the Capital Market Regulation must be explained in order to avoid multiple interpretations since the Capital Market Regulation is the most basic legal basis in the capital market activities in Indonesia. The principle of openness in the Capital Market Regulation can adopt several provisions from other laws that also use or have the principle of information disclosure. The law on public information disclosure has several principles that can be used in capital market activities in Indonesia. One of them can be found in article 2 paragraph (1) and (3) act no 14 of 2008 concerning public information disclosure. These principles in the information disclosure law are:

1. All forms of public information are open and can be accessed by every user of public

information. The transactions in the capital market require the issuers, institutions and supporting professions to adhere to the principle of openness. However, the principle of openness is still a principle and does not explain how the principle of openness should be carried out. In this case, the regulation of the information disclosure makes it clear that open information must be easily accessed by the public. No more information is covered, let alone the information that is very important to be known by the public. The ease of public access will have a positive impact on the investors in investing to an issuer. Thus, the material information and securities traded by the issuers must be correct, so that when it is published to the public, the investors are not misled about this information and must be easily accessed by the public with the development of advance technology.

2. Any public information must be obtained by the public information applicant quickly, accordingly, at a low cost, and simple. The problem that still occurs in Indonesia is that it is still difficult to obtain credible information because of many policies of the informer for certain reasons. This must be cut by the Capital Market Regulation so that the information provided to potential investors must be accepted by the information applicants, in this case is the investors. The OTC Transactions are intended to make the transactions quick and efficient. To achieve the time efficiency, the information obtained by potential investors must be fast, in accordance with what it should be and done in a very simple way.

In addition, the law on information and electronic transactions regulates how the use of information technology and electronic transactions. The OTC transactions are usually carried out by securities dealers over the telephone or computer network without any obligation to use intermediary services (Rahmah, 2019). Transactions made by phone or computer network can be categorized as technology information and electronic transactions. Therefore, to provide better legal protection for the OTC transactions, the UUPM can adopt to the provisions in the information regulation and electronic transactions, on article 4 letter b and e act no 11 of 2008 concerning information regulation and electronic transactions in which those are elucidated as follows:

1. Being able to assist the development of trade and the national economic to achieve the community welfare. The OTC transactions must be able to have a significant impact on the development of trade and the Indonesian economic so that the community is more prosperous. The OTC transactions are indeed formed so that the securities transactions are carried out quickly, efficiently, and can reduce the costs for the issuers. This is because the requirements to be listed on the stock exchange are quite hard, tight and costly (Rahmah, 2019). Therefore, with the OTC transactions, it is expected that the securities trading will develop and have an impact on the Indonesian economic, both for the welfare of issuers who feel safe for the OTC transactions and the issuers who can obtain alternative funds quickly.
2. Providing a sense of security, justice and legal certainty for the users and providers of information technology. The reconstruction of OTC transaction must provide a sense

of security and legal certainty to the parties in conducting various transactions. This can be started with how the form of legal protection and dispute resolution. In addition, a sense of justice must also be demonstrated by non-overlapping arrangements between the issuers and investors. There must be equal protection for both parties. The second reconstruction is the process of dispute resolution in the OTC Transactions. Dispute resolution is a form of repressive legal protection in which the law will provide protection when a dispute occurs. The law provides choices for the community in solving the problems they face in order to obtain the legal certainty.

The settlement of disputes in the capital market has two main mechanisms in resolving the disputes through the consumer complaints. The first is the resolution of complaints by financial service institutions (internal dispute resolution) and the second is the dispute resolution that are not carried out by financial service institutions, but through the judiciary or outside the judiciary (Harrieti, 2105). Basically, the settlement of the disputes in the capital market must go through a complaint to the relevant financial service institutions first. In the case of OTC transactions, the complaints to financial service institutions can be made to the OJK as the financial services authority that oversees the capital market activities in Indonesia.

The Capital Market Regulation (UUPM) needs to adopt many new dispute resolution provisions to provide legal certainty to the parties. One of the aspects that need to be regulated is how the provisions of alternative dispute resolution institutions (hereinafter referred to as LAPS) in deciding upon the OTC transaction dispute cases. The LAPS in the financial services sector is an institution formed specifically by financial services institutions in each sector. In terms of capital markets, the LAPS owned by the capital market sector is BAPMI (Indonesian Capital Market Arbitration Board).

The regulations regarding the LAPS should be regulated in the Capital Market Regulation. This is because the LAPS is only regulated in POJK which technically organizes it and not based on the provisions of the Capital Market Regulation. The non-regulation of LAPS in the Capital Market Regulation creates confusion not only to the Capital Market Regulation and POJK, but also to the consumer protection regulation (hereinafter referred to as UUPK). The UUPK specifically regulates how the procedures for protection in consumer protection and become an umbrella act in legal protection consumer in Indonesia (Satory, 2015). In article 52 act no 8 of 1999 concerning consumer protection regulation, there is what is referred to as the Consumer Dispute Settlement Agency (hereinafter referred to as BPSK) whose one of the tasks is to handle and resolve the consumer disputes through mediation or arbitration or conciliation. The BPSK has similar functions as the LAPS in handling the disputes outside the court. Even there is no legal certainty whether the parties should go to LAPS or BPSK which have the same function, there is a slight difference between them. When the consumer (same as investor) in the situation as final consumer, the party could use UUPK and/or UUOJK and POJK as their legal action tools. But, if they are not the final consumers, the party

could only use UUOJK and POJK as their legal action tools (Suwandono, 2016). The legal issues then arise whether the consumers have to settle the disputes outside the court and must use rules in the financial services sector or whether they can follow the provisions of the UUPK, considering that there are regulations regarding to the goods and/ or services. Even though there are a lot of explanations when the parties could use certain act as their legal tools, it still needs harmonization to get legal certainty in capital market, especially in OTC transaction which is rarely known in Indonesia. It still needs a very strong legal protection.

The phenomenon of disharmony in Indonesia must be resolved by viewing the law as a legal system. As a legal system, there will be an interaction between the legal elements in the legal system. The interaction is possible to cause conflict, whereas the conflict in the system is not desired by the law (Suwandono, et. al., 2016). Then, solution must be in accordance with the principles or doctrines of law. If the provision of the dispute resolution outside the court is regulated in the Capital Market Regulation, then the *lex specialist derogate legi generalis* principle can apply. This principle only applies when the comparable laws and regulations have the same position, for example the UUPM and UUPK. It is important to regulate fundamentals such as alternative solutions to capital market disputes into the capital market regulations.

Conclusion

The weakness of OTC transaction arrangements is inconsistency of OTC regulations in the legislation. Indonesia needs consistent arrangements in managing the over-the-counter transactions. The OTC transaction is one of the solutions for transactions in the capital market in Indonesia for the issuers. Easy requirements and low cost compared to transactions through the stock exchange make the OTC transactions very helpful for the issuers who want to find additional alternative funds. To be able to provide the benefits to OTC transaction agents, it is necessary to have legal certainty that sets limit between the rights and obligations of the OTC transaction agents. Whereas the Capital Market Regulation, which is a reference for the capital market transactions in Indonesia, does not regulate the OTC transactions at all. When viewed from the articles contained therein, the Capital Market Regulation regulates more about transactions conducted on the stock exchange. This can be seen from the provisions governing the institution of the stock exchange, the transaction process, to the rights and obligations of the stock exchange. Although the provisions of the Capital Market Regulation referred to as the capital market are all forms of transactions on public offerings and securities trading, but this does not provide clarity on how the over-the-counter transactions should be carried out in the Capital Market Regulation.

Indonesia currently requires the reconstruction of OTC transaction arrangements that are in accordance with the legal certainty. The OTC transaction arrangements that are still overlapping may cause conflicts on the legal norms between the regulations governing the OTC transactions. The reconstruction that needs to be carried out at the

first place is reconstruction regarding the legal protection for the investors. Legal certainty and having no multiple interpretations will provide a sense of security for the investors in investing their capital in an issuer. Then, the reconstruction that needs to be arranged is the reconstruction of dispute resolution. An alternative dispute resolution is additional to provide repressive legal protection. However, it needs to be regulated so that it does not overlap with the consumer protection regulations.

Suggestions

The Capital Market Regulation (UUPM) as a law underlying capital market transactions need changes in the provisions its governed. It is because the provisions are not in accordance with the period and the development of securities transactions in Indonesia. The UUPM changes will have an impact on the legal certainty since the provisions are regulated in the regulations or laws. Moreover, it is not only regulated in the OJK regulation. Hence, when there are other laws that regulate the same thing, then they must use the provisions of the Capital Market Regulation (UUPM), which is based on *lex specialis derogate legi generalis* which requires that the regulations must have the same degree.

The basic provisions regarding the OTC transactions especially about the legal protection and arrangements regarding the alternative dispute resolution that can provide benefits for the OTC transaction agents must be reconstructed in the Capital Market Regulation (UUPM). The reconstruction of OTC transactions can be adopted from the existing provisions in OJK regulations that already regulate the OTC transactions or those related to it or the regulations that are related to the legal protection and alternative dispute resolution.

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