Monetary penalties: An empirical study on the enforcement of Thai insider trading sanctions

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ABSTRACT
A monetary penalty, as one type of regulatory enforcement tool, can provide a more effective enforcement outcome compared to a conventional criminal prosecution concerning the enforcement of an insider trading penalty. An empirical study of cases and interviews showed that a monetary penalty can result in a greater number of people receiving sanctions, greater success of cases, and more flexible enforcement actions, thereby cutting off certain hindrances existing in the conventional criminal prosecution process. Therefore, monetary penalties should be increasingly introduced and incorporated as an alternative enforcement mechanism into other financial and economic laws, for instance, insurance and banking legislation, in order to provide a robust enforcement action.

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Introduction
There are a number of developments concerning illegal insider trading cases reported in Thailand where, in the most typical circumstance, the management of public companies takes advantage of non-public information to purchase shares. Such a situation materially leads to a potential change in the security’s price, providing such purchasers with an unfair advantage over other people which could corrode confidence in share markets and remove capital from the marketplace. According to the Thai Securities and Exchange Commission (SEC), for instance, the chairman of Siam Global House Public Company Limited (GLOBAL) was alleged, in 2016, by the SEC to have violated the insider trading provisions of the Thai Securities and Exchange Act of 1992 (SEA) in his plan to purchase GLOBAL’s ordinary capital shares through a private placement to be undertaken by SCG Distribution Co., Ltd., a wholly owned subsidiary of Siam Cement Group (Securities and Exchange Commission, 2016). This case was in the public spotlight as it involved one of Thailand’s largest firms having a high level of capitalization.

However, the existence of strong insider trading laws is not sufficient as it further requires effective enforcement by regulators and the courts. Even if the SEA is the key piece of legislation preventing and suppressing insider trading, the provisions of the SEA merely impose criminal penalties as a sanction to offenders. Critically, the prosecution of the criminal case under the criminal law is a time-consuming process, involves several law enforcement authorities, and requires “proof beyond a reasonable doubt”. These circumstances do not respond well to the reality of white-collar crime, where most of the evidence is in the possession of offenders and the trails of criminal offenders are difficult to track. This situation makes the onus of traditional proof in a criminal prosecution a troublesome process for the plaintiff and impedes the effectiveness of capital market supervision. Ultimately, such discrepancies hinder attempts to integrate the regional capital market under the ASEAN Economic Community Blueprint 2025.
Therefore, imposing an alternative type of sanction would be an additional option for effective implementation of insider trading prosecutions. As the revised version of the SEA currently recognizes civil penalties imposed by the SEC in connection with insider trading offences, this paper argues that the imposition of such a monetary penalty under the SEA would provide a more effective enforcement mechanism for insider trading violations, from an empirical perspective, than relying on the conventional criminal penalties that require formal criminal prosecution. Consequently, effective enforcement of the law will increase investors’ confidence and create a level playing field in the intra-ASEAN market, which will eventually reinforce a deeper development of mutual recognition systems among ASEAN securities regulators.

Objectives

1. To review the provisions regarding insider trading under the SEA, in relation to the sanctions imposed.
2. To review the situations, measures, and legal prosecution procedures in connection with insider trading compared to the alternative procedure imposed under the SEA.
3. To investigate the effectiveness of imposing a monetary penalty for insider trading compared to the conventional criminal penalty.
4. To review the dataset of cases undertaken by the SEC concerning insider trading.

Literature Review

Illegal insider trading is prohibited as it is considered as one type of securities fraud which directly impacts the market integrity (Wood, 2010) of capitalist society, so that an investor with insider information could potentially make larger profits than a typical investor could make. According to the report of the International Organization of Securities Commission (IOSCO), insider trading undermines investor confidence in the fairness and integrity of the securities markets and economic efficiency and welfare (Committee, 2003). Therefore, almost every jurisdiction has imposed legislation prohibiting the act of insider trading, and there are varieties of sanctions imposed among different jurisdictions. These can be classified as civil, penal, and administrative sanctions (Committee, 2003).

The implementation of insider trading sanctions by ways of civil and penal sanctions is conventionally carried out through the courts. Where the damaged person can obtain compensation from the wrongdoers through civil litigation for instance, the US Insider Trading and Securities Fraud Enforcement Act of 1988, under which a person committing insider trading activities can be punished with criminal penalties such as imprisonment, fines, or confinement as the case may be (through criminal prosecution). This process is in accordance with the notion that the core function of criminal law in capitalist society is to prevent people from bypassing the system of markets (Posner, 1985). In the case where the bypassing of the system occurs, a mere tort liability is not sufficient for the purpose of punishment but it would require an ultimate damages payment and public enforcement. Nonetheless, criminal sanctions are extremely costly (Posner, 1985). There are practical limitations including a lengthy prosecution period, during which time the defendants or their assets often disappear, the high cost of litigation, and the burden of proof beyond reasonable doubt of the criminal proceeding (Committee, 2003).

This paper is based on the notion of deterrence using monetary sanctions in criminal cases that is associated with lower costs compared to non-monetary sanctions. In the light of this approach, non-monetary sanctions are used in addition to a variety of regulatory tools in jurisdictions throughout the world, where the severity of the sanction varies significantly from case to case. Typically, the most severe end of the spectrum is concerned with conventional criminal proceedings involving multiple counts of insider trading along with other criminal penalties such as money laundering (Bromberg, Gilligan, Hedges, & Ramsay, 2016); however, such a non-monetary sanction involves significant social costs as a result of the expenses of imprisonment and the opportunity costs triggered from excluding labor from the economy. Alternatively, administrative sanctions have been introduced, for example, the imposition of an order to the person involved to pay the amount of profit made by insider trading, along with an additional fine up to certain amounts. Some jurisdictions provide an option to the regulatory authority to choose the appropriate type of sanction or more than one type of sanction can be imposed (Bromberg et al., 2016). Currently, many jurisdictions have pursued administrative proceedings as they result in more effective enforcement and prevention of insider trading (Committee, 2003).

According to the literature review above, the theories concerning sanctions in relation to violations based on insider trading leave room for a regulator, at its discretion, to pursue a policy approach of selecting the optimal regulatory tools. The theoretical discussion does not provide a clear-cut answer as to what is the most effective sanction to be used for prohibition of insider trading; therefore, it would be subject to each jurisdiction’s policies relying on the different law enforcement strategies. Under Thai law, the theoretical foundation still leaves the discretion of choosing the implementation methods. Thus, empirical evidence of prosecution numbers can provide an answer in terms of policy options; in particular, as to whether the imposition of alternative prosecution and punishment methods (that is, deterrence through monetary sanctions) of an insider trading offence under the SEA would provide more effective regulatory tools for market supervision than conventional criminal prosecution.

Scope of Research

This paper focuses on the content analysis of the legislative regime, situations, enforcement measures by related authorities and legal action (that is, both court and out-of-court cases) initiated by the SEC in connection with the insider trading offence under the SEA. In looking at cases, this paper has limited the time period to a span of eight years, in particular between 2009 (a year after the introduction of alternative penalties under the SEA) and 2016.
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