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

Sakda Thanitcul*, Tir Srinopnikom

*Faculty of Law, Chulalongkorn University, Bangkok 10330, Thailand*

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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.

* Corresponding author.
*E-mail address:* tsakda@chula.ac.th (S. Thanitcul).
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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.

## Research Methodology

This paper is based on qualitative research following these steps:

1. Analyzing and comparing the revisions of the SEA provisions concerning insider trading prosecution mechanisms, and comparing them with Singapore's regime;
2. Constructing a dataset of legal actions undertaken by the SEC (both court and out-of-court cases) in relation to insider offences under the SEA. The dataset was generated from a number of SEC press releases and official announcements;
3. Comparing the reports concerning legal actions undertaken by the SEC to enable extensive empirical analysis of the insider trading enforcement; especially examining the types of sentences, banning orders, and various sanctions imposed for insider trading under the SEA;
4. Analyzing the laws related to the enforcement process for insider trading offences;
5. Undertaking some informal interviews with five authorities involved in the enforcement process of insider trading offences: the SEC, the Stock Exchange of Thailand (SET), Department of Special Investigation (DSI), the Public Prosecutor, and the Department of Correction (DOC). The interviews were conducted through phone conversations on a no-name basis, to prevent interviewee bias, with the same set of opened-ended questions concerning enforcement steps and the interviewee's personal opinions. Before each interview, all interviewees were asked questions to ensure that they were all working in the relevant areas of legal prosecution and enforcement; and
6. Developing a research conclusion and recommendations.

## Results and Discussion

### *Result of the Review of Thailand's Insider Trading Enforcement Mechanism Under SEA*

The Thai SEA has criminalized insider trading, prescribing it as an action where (i) the insider trades listed securities on the basis of material “non-public” information (where such information affects the pricing of such securities) or discloses such information whether directly or indirectly to others; and (ii) whether or not such an act is done for self or other's benefit. This paper reviewed the provisions of the SEA (which has been revised four times in 1999, 2003, 2008 and 2016, respectively) concerning sanctions for insider trading. The findings are that the SEA provisions concerning the enforcement of insider trading offences are fundamentally based on penal sanction. The SEA only imposes criminal penalties covering imprisonment and/or fines where a formal criminal prosecution before the court is required.

The comparative study among the amendments of the SEA revealed that there is momentum for introducing an alternative mechanism to supplement the conventional criminal prosecution. The SEA has introduced the concept of monetary penalty, as a part of administrative sanctions, as a punishment for insider trading. A monetary fine arising from insider trading offences could be determined and settled between the alleged persons and the SEC through a Settlement Committee established under section 317 of the fourth amendment of the SEA without initiating a criminal prosecution through the court. Based on the theoretical study made by Lohalertkij (2010), such a monetary fine under the SEA differs from the conventional fine under criminal law because the court critically does not play a role in determining the amount.

Nevertheless, the fifth revision of the SEA has critically modified the provisions of the SEA and provided an option for settling an insider trading offence through a Civil Penalty Committee by way of monetary settlement, as a part of administrative sanctions; depending on the arrangement between the SEC and such alleged persons, the right of pursuing a criminal prosecution would be terminated. The implication of the fifth SEA revision is crucial because it has explicitly laid down a clear principle that monetary penalties can be imposed for settling several types of offences under the SEA instead of undertaking the conventional criminal prosecution venue.

A comparative study with Singapore's insider trading regime, in which the market is currently at the stage of developed market (Russell, 2015), revealed that the revisions of the SEA show that Thailand is moving in a similar direction of using an alternative enforcement mechanism to provide a nuanced approach to combat market misconduct. According to the findings, the Singapore's Securities and Futures Act (Cap. 289) prescribes the application of both civil penalties, as introduced in 2004, and criminal penalties for insider trading. Civil penalty proceedings are brought by the Monetary Authority of Singapore (MAS), while criminal proceedings are brought by the Public Prosecutor. However, the empirical study undertaken by Lei and Ramsy (2014) showed that the civil penalty was predominantly used by MAS instead of pursuing criminal action.

### *Results on an Enforcement Effectiveness: Monetary Penalty Versus Conventional Criminal Penalties*

An empirical study of legal actions undertaken by the SEC during the period 2009–2016 follows.

*Persons and Events Receiving Sanctions*

In connection with insider trading violations, the number of cases (based on the persons being charged) that were settled with the SEC through monetary penalties was significantly higher compared to cases pursuing criminal action.

As shown in Figure 1, the total number of monetary penalty cases was 62 cases—six-times higher than the number of criminal actions initiated by the SEC for which only 10 cases were reported (including both completed and on-ongoing prosecutions). One of the monetary penalty settlements was also expanded to impose sanctions on the legal counsel involved in the transaction. In this regard, there were 28 trading events that led to the imposition of monetary penalties while only five trading events resulted in criminal prosecution. This means that the number of instances where people and trading events received sanctions by way of monetary penalties was substantively

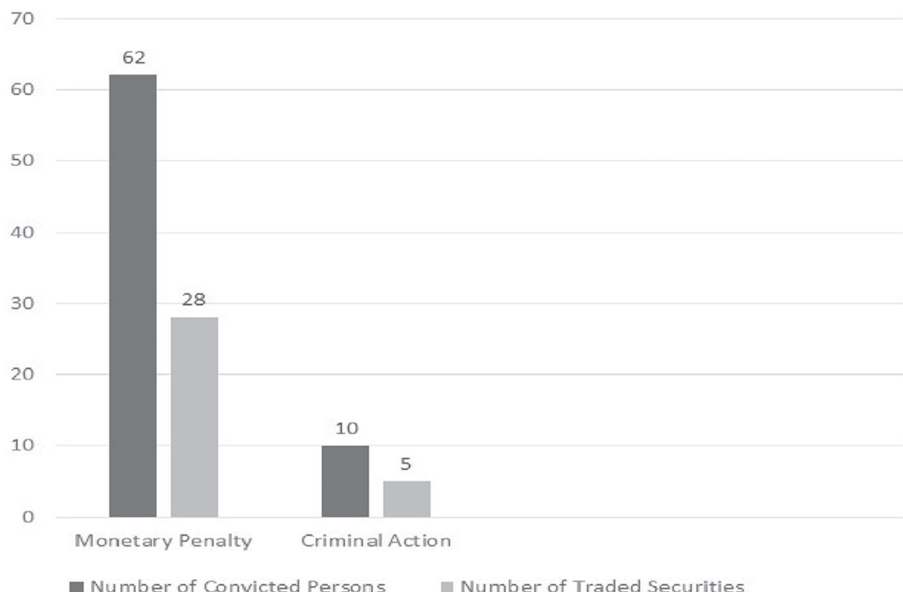


**Figure 1** People and events receiving sanctions

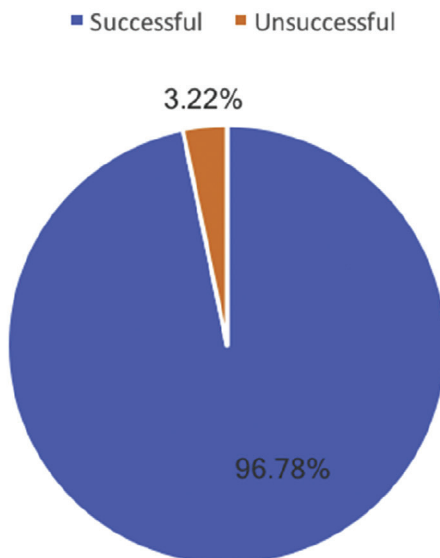


**Figure 2** Success of enforcement using a monetary penalty

higher and broader than for the imposition of a conventional criminal penalty. Such a significant difference implies that the SEC is likely to regularly undertake the alternative enforcement option rather than pursuing conventional criminal prosecution.

*Success of Enforcement*

According to Figure 2, there were two cases out of 62 where the alleged wrongdoers did not pay a monetary penalty within the specific period prescribed by the SEC; therefore, the SEC has subsequently undertaken criminal prosecutions through the court as a result of such non-payment. This means that the success rate from enforcing the monetary penalty was 96.78 percent.

By looking closer at the ongoing cases of a criminal prosecution, Figure 3 shows that six out of the 10 cases are still ongoing (being under consideration by the DSI). There was only one case where the court had brought down a

final decision, while another three cases were being held up by procedural hindrances (such as the period of prescription had expired) and thus were not brought to court. Therefore, the percentage of success rate of undertaking criminal proceeding regarding insider trading was only 10 percent, which is nine times lower that the success percentage for imposing a monetary penalty.

*Sanctions Imposed*

In general cases, a supporter of insider trading would receive a fine of THB 333,333.33 as the monetary penalty while the highest monetary penalty that can be imposed on the principal is THB 30,228,000. By comparison with conventional criminal prosecution, it has been recorded that the court only imposed a fine on the offenders to a maximum amount of THB 2,518,646.23. There was no imprisonment imposed unless the offenders did not pay the fine.

Furthermore, the SEC has undertaken two banning sanctions for a period of three years in 62 cases in addition to the imposition of monetary penalties. By way of comparison, there no ban and custodial sentence has been imposed by the court in connection with criminal prosecutions.

*Observation*

By way of comparison, it is clear that enforcement through monetary penalty in connection with an insider trading offence is more effective than imposing the conventional criminal penalty due to the fact that monetary penalties can cover a larger number and a wider group of persons where the prosecution can further include the legal counsel involved in the insider trading offence. Monetary penalties can also provide a more successful outcome in terms of receiving payment arising from the offence committed. Based on the evidence shown, imposing a monetary penalty further provides flexibility so that the regulator can impose some additional measures, such as bans, to protect market trustworthiness.

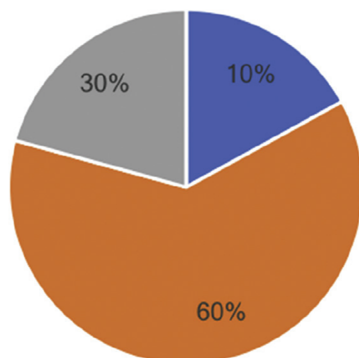


**Figure 3** Court proceedings

*Situations and Procedural Problems of Enforcement*

After reviewing the situation and procedural problems by way of a regulatory review and informal interviews with regulators, the author found that the entire process of prosecuting insider trading offences involves at least five authorities.

According to Figure 4, the SET is the first organization that undertakes the role of monitoring all market transactions. Where it is suspicious, the related data will be gathered and referred to the SEC, being the competent officer under the SEA to investigate the event. In cases where the SEC has resolved to take action against an alleged wrongdoer, the SEC will submit a formal allegation to the DSI to open a formal criminal prosecution. If the DSI finds that there are reasonable grounds for concluding that an offence has been committed, it will submit a complaint to the public prosecutor for a decision on whether or not to file the case in the court. Where the court reaches a verdict of guilty, the offender would be imprisoned under the control of the DOC or has to pay a fine, as the case may be. According to the study by Promchana (2003), in the case where the offender cannot pay the fine, the Legal Execution Department would foreclose on the offender's assets for the purpose of paying the fine, or the defaulter can be confined, which is normally under the control of the DOC, in lieu of paying the fine.

The informal interviews with authorities revealed that the regular steps of prosecuting insider trading offences involve a duplicate and overlapping investigation among the authorities. This situation impairs the effectiveness of the investigation process as the investigation takes longer, allowing an offender to destroy significant evidence. In addition, the requirement of “proof beyond reasonable doubt” is relatively troublesome to apply to economic crimes as most of the evidence is in the possession of the offender and is not direct available. As proof of a criminal offence requires proof of intention, it is necessary for a plaintiff to prove that the offender had the intention of committing insider trading, a lengthy process that consequently involves a complexity of financial knowledge and expertise. Moreover, once the court's decision has been handed down, the enforcement of the decision is also a time-consuming process.

The process of imposing a monetary penalty under the SEA involves only two authorities: the SET and the SEC. Significantly, this reduced involvement of authorities would eliminate duplicate tasks encountered by the regular prosecution process where the SEC can investigate and impose a monetary penalty if it considers that there is reasonable grounds that an offence has been committed. Moreover, proof beyond reasonable doubt is not necessary as the process has bypassed the involvement of the DSI, the public prosecutor, and the court. The interviews revealed that the related authorities believe that the process of imposing monetary penalties would facilitate the enforcement of the law as it requires a less complex prosecution process. The result is supported by the empirical findings concerning the enforcement actions undertaken by the SEC in the foregoing part, which demonstrated that the

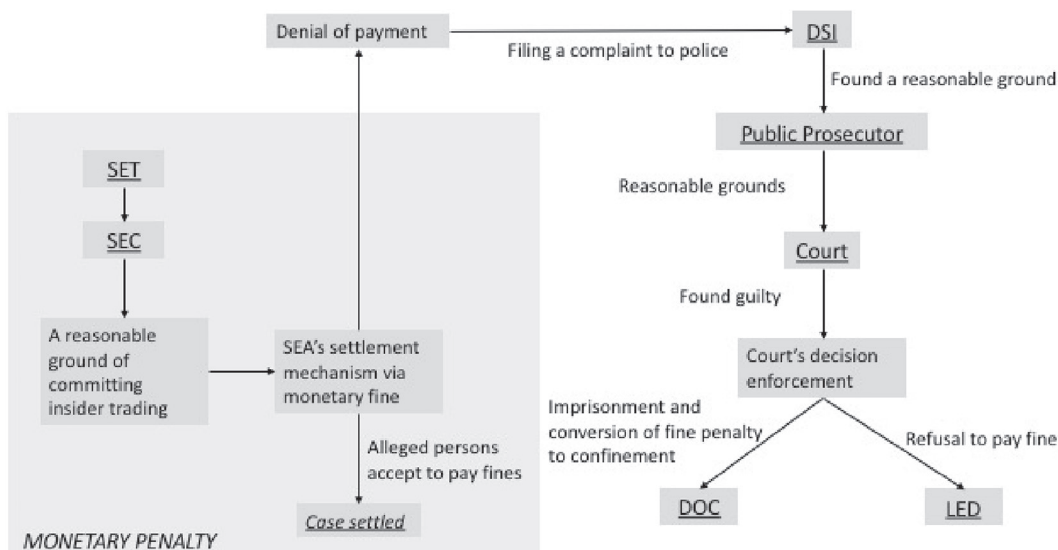


**Figure 4** Prosecution process for insider trading

monetary penalties can cover a greater number of cases and offenders.

*Proposal Concerning an Application of Monetary Penalty*

As a common standpoint, any enforcement scheme should be specifically tailored to the larger regulatory scheme within which it is to work. Significantly, a monetary penalty and its application principles should be expressly prescribed in the legislative scheme. Based on the documentary research and interviews, the following application principles should be incorporated as an implementation nutshell of a monetary penalty in order to enable enforcement effectiveness.

- Proportionality—the monetary penalty should be used as an option as a part of a wider range of enforcement mechanisms. Therefore, the monetary penalty will not replace the conventional criminal penalty but it will be available to obtaining effective compliance. It should be further implemented together with other regulatory tools including disgorgement, reimbursement of investigation costs, and bans (either permanent or temporary).
- Transparency—clear guidance policy on the use of monetary penalties, as an enforcement option, should be put in place. There should be a clear indication to the extent that regulators will be given the discretion to decide whether to impose a monetary penalty and in setting the amount of the penalty to be imposed.
- Availability of appeal—a person subject to the monetary penalty should have an opportunity to have the penalty reviewed by an independent body under certain conditions. The current situation of a monetary penalty under the SEA is that if an alleged person rejects the sanctions, conventional criminal prosecution will be used instead of a monetary penalty, regardless of whether or not the alleged person still wants to pursue the monetary penalty venue.
- Conflict of interest—significantly, regulators' personnel involved in making a decision concerning the monetary penalty should not have a conflict of interest regarding the companies or persons receiving sanctions. Moreover, to prevent any allegation of improper enforcement actions, regulators should not get the benefit of any penalty payment received. Therefore, it is more appropriate to set up a penalty fund into which the penalty payments are to be paid directly and to then be used for recovering any damages caused by the violation.

## Conclusion and Recommendation

In relation to the enforcement of insider trading offences, the imposition of a monetary penalty is considered a more effective regulatory tool than a punishment based on the conventional criminal penalties. As the provisions of the SEA concerning insider trading have adopted the mechanism of alternative settlement for an insider trading dispute, the empirical study showed that within a similar period, monetary penalties can cover a larger number and a wider group of people. Monetary penalties can also provide a more successful outcome in terms of receiving payment arising from the offence committed. Moreover, the interviews revealed that the process of imposing monetary penalties would facilitate the enforcement of the law as it involves a less complex prosecution process.

Based on the findings, it is recommended that monetary penalties should be considered and incorporated into other financial and economic legislation, such as insurance and banking laws, in order to provide an alternative enforcement mechanism. Moreover, it is important that the application principles should be incorporated into the application process covering proportionality, transparency, availability of appeal, and conflict of interest.

## Conflict of Interest

The authors declare there is no conflict of interest.

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