

CORPORATE CRIMINAL LIABILITY FOR BRIBERY OFFENCES IN PRIVATE SECTOR^{*}

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Abstract

Corruption has long been recognised as a significant problem in all countries, with bribery being a form of corruption that is likely to occur on a daily basis. Both public and private bribery have a widespread effect on a country in terms of harming economic growth and creating social inequality.

Although the number of private-to-private bribery cases has significantly increased due to changes in the world's social context, according to the study, no direct legal provision has been regulated to control bribery in Thailand's private sector. The current Thai bribery laws are focused on public bribery, including the bribery of foreign public officials, and are unable to be adapted for use with general cases of private bribery.

This article would like to propose the criminalisation of private-to-private bribery by both individuals and juristic persons and regulating the offence of private bribery under the Thai Penal Code.

Keywords: Bribery, Corruption, Bribery in Private Sector

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1. Introduction

Corruption is a significant problem that hinders countries' economic growth on a global scale. It is a particularly endemic problem in Thailand, where the population is generally of the opinion that it is traditional to pay a bribe in exchange for favours. This is confirmed by Thailand ranking 101st of 180 countries listed in the Corruption Perceptions Index (CPI) 2019 announced by Transparency International, with a score of 36 points out of a total of 100.¹ It is common in Thailand for individuals or private companies to bribe public officials, and the existing Thai anti-bribery law is only focused on bribery in the public sector. There is no direct legal provisions regarding bribery in the private sector.

Although private-to-private bribery does not involve public officials, it still has a widespread effect on the public order by causing unfair trade competition across the market, which leads to economic concentration and eventually, social inequality. Transparency International (TI) is also of the view that 'private sector corruption should be subject to preventative measures and should be criminalised just like corruption in the public sector. The private sector has become larger than the public sector in many countries and the line between the two sectors is blurred by privatisation, outsourcing and other development.'²

The private sector has grown to play a significant role in the economy of many countries, and Thailand is no exception. In order to create an anti-corruption environment, build and maintain fair trade competition in the Thai market and obtain the trust of foreign investors, the Thai anti-bribery law should focus on the laws that control bribery in the

¹ Transparency International, 'Corruption Perception Index 2019' (*Transparency International*) <<https://www.transparency.org/en/cpi/2019/results>> accessed 20 June 2020.

² Transparency International, 'UN Convention Must Criminalise Private Sector Corruption' (*Transparency International*, 10 march 2003) <<https://www.transparency.org/en/press/un-convention-must-criminalise-private-sector-corruption-says-transparency#>> accessed 7 June 2020.

private sector, as well as in the public one. If Thailand can control, or ideally prevent, bribery in the private sector as well as the bribery in the public sector, it will create a less corrupt environment in which it will gain foreign investors' trust and hence, the necessary funding for development. This will help to improve the employment rate and the distribution of income, thereby achieving sustainable social equality.

2. Bribery in the Private Sector and Corporate Criminal Liability

There is no one universal definition of bribery, since the meaning can vary based on the socio-economic, political and cultural factors of each country. However, bribery could be summarised as meaning to offer, promise, give or accept an asset or other advantage in exchange for something in return or to induce another person to do or not to do something illegal for the benefit of the bribe giver or a third party.

In this regard, bribery could be separated into 1.) Active Bribery is the case where a person offer, promise, or give a bribe to other persons in exchange for a benefit to themselves or other. 2.) Passive Bribery which occurs when persons request, accept, or receive a bribe.³ Hence, to control or, ideally, prevent bribery in the private sector, the domestic law should cover both cases where juridical persons act as bribe givers or bribe receivers.

2.1 Bribery in the Private Sector

Private-to-private bribery is defined as bribery from a business operator to an entity or individual of a counterparty.⁴ A classic example of private-to-private bribery is when sales persons or company managers give or promise to give money, presents or other benefits to buyers of other

³ Transparency International UK, 'Global Anti-Bribery Guidance' (*Transparency International UK*) <<https://www.antibriberyguidance.org/guidance/5-what-bribery/guidance>> accessed 25 May 2020.

⁴ Jeffrey R Boles, 'The Two Faces of Bribery : International Corruption Pathways Meet Conflicting Legislative Regimes' (2014) 35(4) Michigan Journal of International Law 673.

companies to induce them to purchase their products or to secure an order. In these cases, the payment of the bribe may be to benefit the buying company or the sales persons by helping them to meet their sales target, or to benefit both sides.⁵ Because private-to-private bribery can benefit both sides (the bribe giver and bribe receiver), there is very little information of actual cases of private-to-private bribery in the public domain.

However, Singapore, the only Asian country who ranked in the top 10 of the Corruption Perception Index produced by Transparency International, published that in the last 5 years the number of corruption in private sector continue to be the majority of all the corruption cases registered for an investigation (85-90% of the total cases registered for an investigation).⁶ Thus, this number would be similar to other countries where the number of private bribery are growing continuously.

The consequence of private-to-private bribery affects both of private sector itself and to public sector. For private part, bribery creates unfair competition because not all companies are able to pay a bribe. While some are both able and willing to pay a bribe in exchange for some advantages, others in the market that may not be able to do so may be excluded from market competition.⁷ Private bribery could impact through the whole supply chain, distorting markets and competition.

The legal treatment of private-to-private bribery differs among countries based on the value of the bribe. However, the major response is

⁵ Antonio Argandoña, 'Private-to-Private Corruption' (2003) 47(3) Journal of Business Ethics 253.

⁶ Corrupt Practices Investigation Bureau, 'Corruption Situation In Singapore Remains Firmly Under Control' (CPIB, 18 May 2020) <<https://www.cpi.gov.sg/press-room/press-releases/corruption-situation-singapore-remains-firmly-under-control?>> accessed 1 June 2020.

⁷ United Nations Office on Drug and Crime, 'Consequence of Private Sector Corruption' (UNODC, December 2019) <<https://www.unodc.org/e4j/en/anti-corruption/module-5/key-issues/consequences-of-private-sector-corruption.html>> accessed 29 May 2020.

to criminalise it.⁸ To effectively enforce the criminal offence of private bribery, each country needs to clearly define the scope and definition of ‘corporate liability’ because, since private bribery can be done for the benefit of the private company itself, it should also be penalised.

2.2 Corporate Criminal Liability and Sanctions

According to Article 59 of the Thai Penal Code, persons shall be liable for a criminal offence when they commit an act intentionally. However, when considering corporate criminal liability, there is a need to determine if a juristic person who is a person established under the law could act with the intention and criminalise. The Thai criminal law has adopted the identification doctrine as a model of the criminalisation of corporate criminal liability. Under the identification doctrine model, the determination of corporate criminal liability depends on connecting the juristic person to its directing mind (i.e. director or representative), who acts in the scope of the juristic person’s objective and for its benefit.

Regarding the criminal sanctions, in Thailand, according to Section 18 of the Thai Penal Code, the punishments that can be imposed on offenders consist of death, imprisonment, confinement, fines and the forfeiture of property. All these criminal sanctions can be imposed on a natural person, but only fines and the forfeiture of property can be imposed on juristic persons due to their nature.

2.3 The Current Thai Law in relation to Bribery

As mentioned earlier, there is no direct legal provision in Thailand related to bribery in the private sector. However, there are provisions that could probably be adapted for use with private bribery cases under Section 353 of the Thai Penal Code, Section 176 of the OACC and Section 57 of the

⁸ United Nations Office on Drug and Crime, ‘Response to Private Sector Corruption’ (UNODC, December 2019) <<https://www.unodc.org/e4j/en/anti-corruption/module-5/key-issues/responses-to-private-sector-corruption.html>> accessed 28 May 2020.

Trade Competition Act B.E. 2560 – Unfair Trade Practices, which are detailed below.

2.3.1 Section 353 of the Thai Penal Code: Dishonest Actions Contrary to One's Duty

Although Thailand has no direct legal provision related to bribery in the private sector, Section 353 of the Thai Penal Code could be adapted for use in specific bribery cases.

The offence is committed when a person who is entrusted to manage another person's property 'destroys trust' by dishonestly performing any act contrary to his/her duty and such act damages the benefit of the other person's property.⁹ The duty under this provision could be a duty established by law, such as a legal representative, a duty established in a contract, such as the branch manager of a bank, or a court-appointed duty, such as heritage administrator.¹⁰ This provision requires both general and specific intent. The specific intent required under this provision is dishonesty, which involves seeking any kind of undue benefit, such as the membership of a golf club, promotion, or the right to school admission, etc. Therefore, in my opinion, this provision could be applied to bribery in the private sector if it was committed by an agent, employee or another person appointed by the company whose duty was established in a contract, but there needs to be proof that the action damaged the company's property.

Nevertheless, although Section 353 of the Thai Penal Code can be applied to bribery in the private sector in some specific cases, it is limited by the need for the property owner to prove that his benefits had been damaged by the bribery. Therefore, in my opinion, this provision cannot be

⁹ Kanaphon Chanhom, *Kham Atibai Kotmai Arya Pakkwampid Lem 3 [The Explanation of Criminal Law, Misconducts Part Book 3]* (5th edn, Winyuchon 2020) 378 (คณพล จันทน์หอม, คำอธิบายกฎหมายอาญาภาคความผิด เล่ม 3 (พิมพ์ครั้งที่ 5, วิญญูชน 2563) 378.

¹⁰ *ibid.*

applied to general bribery cases, since not every general bribery case causes damage to property.

2.3.2 Article 176 of the Organic Act on Counter Corruption B.E. 2561

According to Article 176 of the OACC, it is a criminal offence for individuals and juristic persons to bribe a public official, foreign public official or an official of a public international organisation. This provision is consistent with the mandatory requirement in Articles 15 and 16 of the UNCAC with regard to the bribery of national public officials, foreign public officials and officials of public international organisations.

Article 176 imposes the concept of corporate criminal liability for the offence of bribery if the person doing the bribing is associated with a juristic person and committing the bribery for its benefit and the juristic person shall be liable for a criminal offence under this Article if it has failed to implement an appropriate internal control to prevent that person from committing the bribery. A person associated with a juristic person can be its representative, employee, agent, its affiliate company, or any person who acts on its behalf, regardless of whether they have the power or the authority to perform such action.¹¹

Although this provision regulates private-to-public bribery, some parts of it can be used to address private-to-private bribery when drawing on anti-bribery law. Nevertheless, this provision is limited in that it only penalises active bribery in the public sector; therefore, passive bribery and the object of the criminal action need to be considered in order to adapt this provision for use with private-to-private bribery.

¹¹ Office of the National Anti-Corruption Commission, Organic Act on Counter Corruption B.E. 2561 (2018) s 176.

2.3.3 Article 57 of the Trade Competition Act B.E. 2560 – Unfair Trade Practices

As mentioned earlier regarding the impact of private bribery, it creates unfair competition, since not all companies in the market are willing or able to pay a bribe. Therefore, the Trade Competition Act B.E. 2560 was enacted in Thailand to prevent unfair trade. It is stated in Article 57 that a business operator should not behave in a way that damages other operators by unfairly restricting their business, unfairly using superior marketing power or bargaining power, or unfairly defining trade conditions to limit or restrict another operator's business.

This is a broad provision, since there is a need to consider what constitutes the 'damage' one business operator could cause to another. According to the guidelines provided by the Office of Trade Competition Commission (OTCC), the consideration of a wrongful act under Article 57 of the Trade Competition Act B.E. 2560 that can damage another business operator should be based on economic loss, such as the loss of income of the business operator, loss of the market value of goods or services and loss of production or the provision of a service opportunity.¹² If adapting this provision to determine if private bribery causes unfair competition, it is difficult to prove the 'damage' incurred by the other business operator. Hence, the burden of proof of 'damage' rests with the judge.

Apart from proof of damage, the OTCC also provides guidelines to prove an 'unfair act'. This is an act that is not normally performed during the course of business, the conditions are not in writing and the other business operator is not informed of it in advance within a reasonable period according to trade tradition, and such an act is not reasonable based on business morals, marketing or economic.¹³ In this context, it is difficult to

¹² Office of Trade Competition Commission Notification on the Guideline to Considerate the Damages Causes to Other Business Operators B.E. 2561 (2018) art 5.

¹³ *ibid*, art 11.

prove if an act was unfair, as well as if it damaged the other business operator.

In view of the above, it appears to be difficult and time-consuming to prove a wrongful act under Article 57 of the Trade Competition Act B.E. 2561. Therefore, it may not be suitable to adapt to use with private bribery.

3. International Treaty and Foreign Countries' Anti-Bribery Law in the Private Sector

Regarding that the current Thai law in relation to bribery may not be used for general private bribery cases, the concept of the anti-bribery law that applies to the private sector of the UNCAC, Singapore, UK and German law will be examined in order to identify an appropriate legal model that can be adapted for use with Thai law.

3.1 United Nations Convention against Corruption 2003 (UNCAC)

The United Nations Convention against Corruption 2003 was the first universal anti-corruption instrument adopted at the United Nations General Assembly on the 31st October 2003 and it came into force on the 14th December 2005. 187 countries had become party to the UNCAC as of the 6th February 2020,¹⁴ with 140 signatory countries. Thailand signed the Convention on the 9th December 2003 and ratified it on the 1st March 2011.

Article 21 of the UNCAC contains an optional requirement for each State Party to consider enacting and implementing legislation and other measures to criminalise bribery in the private sector if it was committed intentionally during the course of economic, financial or commercial activities. This criminal offence covers the direct or indirect act of a promise, offer, gift, request or acceptance of an 'undue advantage' that causes

¹⁴ United Nations Office on Drug and Crime, 'United Nations Convention against Corruption' (UNDOC) <<https://www.unodc.org/unodc/en/corruption/uncac.html>> accessed 3 June 2020.

persons who work for a company in the private sector or for themselves to breach their duty.¹⁵

3.2 The Prevention of Corruption Act of Singapore

Singapore has the distinction of being the least corrupt country in Asia based on the Corruption Perception Index (CPI) 2019 produced by Transparency International. In the global coalition against corruption, Singapore was ranked 4th of 180 countries with a score of 85 of 100¹⁶ (Denmark was ranked 1st with a score of 87. A score of 100 means no corruption). Singapore is the only Asian country in the top 10 of the CPI.

Singapore signed the UNCAC on the 11th November 2005 and then ratified it on the 6th November 2009. The Prevention of Corruption Act (PCA) was enacted on the 17th June 1960, Chapter 241 of the PCA, which is the major anti-corruption legislation in Singapore, criminalises bribery in both the private and public sectors and provides a clear and broad definition of 'gratification' which, in summary, includes both monetary and non-monetary, tangible and intangible benefits. Bribers and those being bribed under the PCA could be both individuals and corporations, whether the offence was committed directly or indirectly.

The PCA also clearly empowers Corrupt Practices Investigation Bureau (CPIB) to make an arrest and investigate cases of corruption, which enables them to work independently with the full authorisation to deal with all corruption cases in Singapore. Furthermore, it contains a clear provision to protect informers in corruption cases, which is the key to fighting corruption, especially in the private sector, where both the bribe giver and bribe receiver benefit from the corruption. In these cases the

¹⁵ United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) A/58/422, art 21.

¹⁶ Transparency International, 'Corruption Perceptions Index Singapore' (*Transparency International*) <<https://www.transparency.org/en/cpi/2019/results/sgp>> accessed 30 May 2020.

corruption would be unlikely to be revealed without the aid of a whistle-blower.

3.3 The Bribery Act 2010 of the United Kingdom

In order to combat bribery, the Bribery Act 2010 (UK Bribery Act) came into force on the 1st July 2011. The UK Bribery Act is a regulation that criminalises bribery in both the public and private sectors. The UK Bribery Act contains a clear definition of bribery and introduces a strict liability offence for the failure of companies and partnerships to prevent the offence of bribery from being committed by persons associated with them under Article 7 of the UK Bribery Act. However, the UK Bribery Act provides a defence for the relevant commercial organisation if it can prove that it has put ‘adequate procedures’ in place to prevent its associated person from committing the offence of bribery.

The focus on private sector bribery and the strict liability for commercial organisations to prevent bribery distinguishes the UK Bribery Act from any previous regulations.

3.4 The Anti-Bribery Law of Germany

According to the CPI, Germany ranked 9th of 180 countries in 2019 with a score of 80 out of 100.¹⁷ The anti-bribery law in Germany covers bribery in the public, as well as the private sector. Bribery committed by an individual in the private sector is regulated under the German Criminal Code (Strafgesetzbuch – StGB). However, bribery that involves a legal person will be penalised under the Act on Regulatory Offences (Gesetz über Ordnungswidrigkeiten - OWiG), since Germany has no concept of corporate criminal liability. Regarding that there is no specific authorisation for the offence of bribery in Germany, the public prosecutors’ office is responsible

¹⁷ Transparency International, ‘Corruption Perception Index Germany’ (Transparency International) <<https://www.transparency.org/en/countries/germany>> accessed 24 July 2020.

for investigating the private bribery committed by an individual, which is criminalised under the German Criminal Code.¹⁸ Meanwhile, the Administrative Authority is empowered to investigate private bribery that involves a legal person by the Act on Regulatory Offences.

However, the Federal Ministry of Justice and Consumer Protection (BMJV) published a draft bill in April 2020 in relation to corporate criminal liability entitled the ‘Corporate Liability Act (Verbandssanktionengesetz : VerSanG)’.¹⁹ This draft bill introduced a corporate crime which involves an action that violates the obligations of the company or one that results in enriching the company.²⁰

4. Comparative Analysis of the Offence of Private-to-Private Bribery under the Singaporean, UK, German Laws and Article 21 of the UNCAC

The concept of the anti-bribery law in the private sector under the UNCAC, the UK bribery Act and the PCA criminalises both active and passive bribery committed by either a natural person or a juristic person. The German law also criminalises active and passive bribery in the private sector committed by a natural person and the legal person is also liable for an administrative fine if it is involved in bribery in the private sector. However, the private bribery offence in Germany is more specific and narrow than in the UNCAC, the UK bribery Act and the PCA, since it is limited to the

¹⁸ Global Legal Insights, ‘Bribery & Corruption 2020 | Germany’ (*Global Legal Insights*) <<https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/germany>> accessed 9 September 2020.

¹⁹ Nicolai Behr and Robin Haas, ‘German Ministry of Justice publishes draft corporate liability act – what companies must expect’ (*Verbands Sanktionen Gesetz*, 26 April 2020) <<https://verbandssanktionengesetz.de/german-corporate-liability-act-20200426/>> accessed 9 September 2020.

²⁰ Nicolai Behr, ‘Section 2 – Definition; offences committed abroad’ (*Verbands Sanktionen Gesetz*, 5 May 2020) <<https://verbandssanktionengesetz.de/chapter/section-2-definitions-offences-committed-abroad/>> accessed 9 September 2020.

objective of a competitive purchase of goods or services and does not cover other aspects of private bribery.

The definition of a bribe is also broad, since it can be a monetary, non-monetary, tangible or intangible benefit paid to induce or reward any person for breaching his or her duty.

In terms of corporate criminal liability for the offence of bribery in the private sector, the UK Bribery Act includes the concept of strict liability for commercial organisations where the commercial organisation could fall under the private bribery offence for failing to prevent persons associated with them from committing the offence. This strict liability of a juristic person can also be found under the Act on Regulatory offences of Germany if the legal person's representative or executive committed the bribery offence by violating the juristic person's duties, or if the legal person failed to prevent or make it difficult for its staff to commit the offence. The concept of strict liability is suitable for use with a juristic person, since it does not require proof of intent.

Furthermore, in Singapore, the PCA contains a clear provision to protect informers in corruption cases, which is key to fighting corruption, especially in the private sector, where both the bribe giver and bribe receiver benefit from the corruption. In these cases the corruption would be unlikely to be revealed without the aid of a whistle-blower. Moreover, in Singapore, it is easy for the public to access the CPIB. They can report instances of corruption by writing to the CPIB, calling the duty office, issuing an e-complaint via the CPIB website or e-mail and, if the complaint contains sufficient information and falls within the remit of the CPIB, it will investigate it and take further action if needed.

In terms of territorial reach, I would like to highlight the broad extra-territorial effect of the UK Bribery Act. The benefit of the UK bribery act is the territorial reach of corporate criminal liability for failure to prevent bribery, which covers 1) a company that is incorporated under UK law, and 2) a company that is incorporated anywhere, which is operating a business or part of a business in the UK, regardless of the acts or omissions that form

part of the related offence. This enables the UK government to control all companies that operate in the UK, as well as UK companies that operate in other countries around the world.

5. Conclusion

To successfully combat corruption in Thailand, it is important to regulate legislation related to bribery in the private sector. Since there is no other measure to enforce the law or compel people to comply with it, the offence of bribery in the private sector should be criminalised in order to deter people from committing it. Based on the study of the UNCAC, the UK Bribery Act, the PCA and German Criminal law, Thailand should legislate bribery in the private sector under the Thai Penal Code as an offence covering both active and passive bribery committed directly or indirectly by either a natural person or a juristic person. In addition, since private companies play a significant role as bribe givers, Thailand should also adopt the strict corporate liability of the UK's bribery act by imposing strict liability on private companies that fail to prevent bribery from being committed by an associated person. Furthermore, the sanctions should be proportionate to the offence; therefore, the penalty imposed should at least cover the amount of the bribe. In addition, the government should enact a law to protect informers in order to give them confidence to come forward and encourage society to help to monitor bribery in the private sector in Thailand.

Although criminal law may be used as an instrument to deter bribery and protect the public order, criminal law on its own is inadequate to combat corruption. In the longer term, it is important to educate the Thai people to see the big picture and be aware of the negative consequences of this offence, even on a small scale, so that Thailand will eventually become a country that has zero-tolerance of the corruption that is currently harming its economic development.

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