

Regulating the Third Sector in Thailand: The Problem of Defining Social Enterprises in the Draft Legislation on Social Enterprise Promotion*

*Prapin Nuchpiam***

Abstract

The historical roots of the Thai third sector – the sector that is not part of the state (public sector) or the market (private sector) – can be traced far into the past, especially to the philanthropic role of religious institutions and voluntary associations set up by the Chinese from at least the late 19th century. Such organisations represented Thailand’s traditional third sector and thereby provided a crucial social foundation for its present-day third sector, of which a social enterprise forms part. The Thai third sector has continuously adjusted itself to external as well as domestic challenges and opportunities, particularly by becoming more entrepreneurial in its orientation and less dependent on grants and donations.

* การกำกับดูแลภาคที่สามในประเทศไทย: ปัญหาการตีความคำนิยามของวิสาหกิจเพื่อสังคมตามร่างพระราชบัญญัติส่งเสริมวิสาหกิจเพื่อสังคม พ.ศ.

** ประพิน นุชเปี่ยม

Lecturer at Graduate School of Law, National Institute of Development Administration (NIDA), MA. in English (2nd Class Honours), Chulalongkorn University, LL.B., Thammasat University, LL.M., International Tax Law (Merit), Queen Mary University of London (UK), Ph.D. in law, Durham University (UK).



This paper engages in a brief survey of the emergence of social enterprises in Thailand, which are considered part of the third sector, and then analyses the Social Enterprise Promotion Bill in the light of the burgeoning social enterprise sector. The initiation of the Bill clearly represents an attempt to promote social enterprises in Thailand. However, as the current debate has already raised some concern about possible practical effects, its thorough analysis is imperative. The analysis in this paper is nevertheless restricted in its focus to the problem of finding a definition of social enterprises that suits the purpose of promoting social enterprises in Thailand.

Relying on a document-based research method and empirical evidence, the paper has found that the attempt to define social enterprises has suffered from practical difficulties. Defining social enterprises is certainly not an easy task. In Thailand, the task has been complicated by the lack of an understanding of the emergence and nature of social enterprises, as well as the lack of a unified working system for a particular policy area. This is evident in the fact that different people and organisations have proposed different definitions. The paper raises doubt about the definition provided in the Bill, particularly in so far as its practical effects are concerned – it is a doubt whether the Bill, when it becomes law, would promote or restrict the growth of social enterprises in Thailand.

Keywords: Third sector, Social enterprise, Emergence of social enterprise, Social enterprise law, Social enterprise promotion, Thailand

บทคัดย่อ

รากเหง้าทางประวัติศาสตร์ของภาคที่สาม ซึ่งเป็นภาคที่มีได้เป็นส่วนหนึ่งของภาครัฐ หรือระบบตลาด (ภาคเอกชน) ของไทย สามารถสืบย้อนกลับไปได้ไกลในอดีต โดยเฉพาะไปถึงบทบาทเชิงการกุศลของสถาบันทางศาสนาและของสมาคมด้านสังคมสงเคราะห์ที่จัดตั้งขึ้นโดยชาวจีนตั้งแต่น้อยช่วงคริสต์ศตวรรษที่ 19 องค์การเช่นนี้ถือเป็นส่วนหนึ่งของภาคที่สามดั้งเดิม และในฐานะนี้ก็เป็นรากฐานทางสังคมที่สำคัญยิ่งของภาคที่สามของไทย ซึ่งมีวิสาหกิจเพื่อสังคมเป็นส่วนหนึ่งด้วย ภาคที่สามของไทยได้ปรับตัวตลอดมาให้เข้ากับสิ่งท้าทายและโอกาสต่าง ๆ ทั้งที่มาจากภายนอกและภายในประเทศ โดยเฉพาะการปรับการดำเนินงานให้มีแนวทางการประกอบการเชิงธุรกิจมากขึ้น และพึ่งพาเงินสนับสนุนและเงินบริจาคให้น้อยลง

บทความเรื่องนี้เป็นการสำรวจอย่างสั้น ๆ ว่า วิสาหกิจเพื่อสังคมปรากฏขึ้นในประเทศไทยได้อย่างไร โดยเฉพาะอย่างยิ่งการเป็นส่วนหนึ่งของภาคที่สาม และจากนั้นเป็นการวิเคราะห์ร่างพระราชบัญญัติส่งเสริมวิสาหกิจเพื่อสังคม พ.ศ. โดยพิจารณาจากบริบทของการขยายตัวของกิจการประเภนี้ คำริที่เป็นร่างกฎหมายฉบับนี้เป็นความพยายามที่จะส่งเสริมวิสาหกิจเพื่อสังคมอย่างไรก็ตาม ดังที่การถกเถียงที่ดำรงอยู่ขณะนี้ได้แสดงถึงความกังวลเกี่ยวกับผลในทางปฏิบัติที่เป็นไปได้ ดังนั้น การวิเคราะห์ร่างพระราชบัญญัติอย่างครบถ้วนจึงเป็นความจำเป็นอย่างยิ่ง แต่การวิเคราะห์ในบทความนี้จะจำกัดอยู่ที่ปัญหาการตีความนิยามของวิสาหกิจเพื่อสังคมที่เหมาะสมกับวัตถุประสงค์ของการส่งเสริมวิสาหกิจเพื่อสังคมในประเทศไทย

บทความนี้ โดยอาศัยวิธีการวิจัยเอกสารและหลักฐานเชิงประจักษ์ ได้พบว่า ความพยายามที่จะกำหนดนิยามของวิสาหกิจเพื่อสังคมประสบความสำเร็จลำบากในทางปฏิบัติ จริงอยู่ การกำหนดนิยามวิสาหกิจเพื่อสังคมมิใช่ภารกิจที่จะดำเนินการให้สำเร็จลุล่วงได้โดยง่าย ในประเทศไทย ภารกิจนี้ประสบความสำเร็จยากยิ่งขึ้น โดยเฉพาะการขาดความเข้าใจในเรื่องของที่มาและธรรมชาติของวิสาหกิจเพื่อสังคม รวมไปถึงการขาดระบบการทำงานด้านนโยบายที่เป็นอันหนึ่งอันเดียวกัน สภาพเช่นนี้เห็นได้จากข้อเท็จจริงที่ว่า บุคคลและองค์กรต่าง ๆ ได้เสนอนิยามที่ต่างกัน บทความนี้แสดงความกังวลเกี่ยวกับนิยามที่กำหนดไว้ในร่างพระราชบัญญัติ โดยเฉพาะในส่วนที่เกี่ยวกับผลในทางปฏิบัติที่จะเกิดขึ้น เป็นความกังวลว่า ร่างพระราชบัญญัติฉบับนี้ เมื่อผ่านออกมาเป็นกฎหมายแล้ว จะมีผลส่งเสริมหรือจำกัดการเติบโตของวิสาหกิจเพื่อสังคมในประเทศไทย

คำสำคัญ: ภาคที่สาม, วิสาหกิจเพื่อสังคม, วัฒนากการของวิสาหกิจเพื่อสังคม, กฎหมายวิสาหกิจเพื่อสังคม, การส่งเสริมวิสาหกิจเพื่อสังคม, ประเทศไทย



1. INTRODUCTION

This paper analyses the regulation of the third sector in Thailand with a focus on the draft legislation on social enterprise promotion. “Third sector”¹ still remains an unfamiliar term in Thailand even today. Representing a Western conception of the different sectors of society and the economy, the term was only recently introduced to this country. However, organisations of this type have been present since its distant past. I shall thus begin my study with a brief survey of what I call the traditional third sector in Thailand. As I shall point out, it is from this sector that Thai social enterprise has emerged. The types of traditional third sector organisations will be identified with a view to distinguishing them from social enterprises, whose typology will be lineated for this purpose. The part on the government’s attempts to regulate social enterprises will focus on the issue of finding an appropriate definition of social enterprises [or you can use “social enterprise” to emphasize that you are talking about a vocabulary not a thing] for the draft legislation on social enterprise promotion. Finally, certain concerns about the attempts to regulate social enterprises in Thailand will be discussed.

2. FROM TRADITIONAL THIRD SECTOR TO SOCIAL ENTERPRISE

2.1 Historical Roots of the Traditional Third Sector in Thailand

The historical roots of Thai third sector organisations can be traced far into the past, especially to the philanthropic role of religious institutions. Most notably at the time when public education as provided by the state was still not available, Buddhist monasteries assumed a central role in providing literacy, though this was normally limited to the male population. Later, in the 19th century, it was Christian religious institutions that introduced modern, or western-style, education to Thailand.² The delivery of educational services has since then been a major public

¹ For a brief overview of what the third sector is and how a social enterprise forms part of this sector, see Carlo Borzaga and Jacques Defourny (eds.), *The Emergence of Social Enterprise*, (London and New York: Routledge, 2001).

² The first school for boys – the Bangkok Christian College – was set up by the American Presbyterian Mission in 1852 and later in 1874 the mission also established the first school for girls, which is now called Wattana Wittaya Academy. The Catholic Mission also set up its first school for boys,

policy, and today the state has adopted a 15-year free education policy from early childhood to upper secondary education. However, the government cannot in practice provide free education for all children. A large number of Buddhist monasteries, especially in the countryside (and even some monasteries in Bangkok) still run “temple schools” where Buddhist monks and novices attend classes together with poor local children.³ All this is still not to mention Islamic schools, especially in the form of *pondok* schools that have been responsible for religious education of countless Muslim children in Thailand.⁴

While religious institutions have since the distant past served as the mainstay of an equivalent of the modern-day third sector, in a more recent time, namely from about the late 19th century, the early forms of philanthropic and charitable organisations began to take shape. The Thai Red Cross was founded during this time. Though closely associated with the state sector,⁵ the Thai Red Cross represents one of the earliest organisations of this type. However, the most notable of them were, interestingly, those set up by the Chinese immigrant community. The origins of Chinese associations, mostly in the form of “secret societies”, can be traced back to the 17th century.⁶ Although some secret societies also engaged in illegal activities, such as opium trade or even robberies, their main purpose was to render assistance, such as in finding jobs for new immigrants, resolving disputes between employers and employees, and providing protection

“Le Collège de l’Assomption” (later to be formally known as “Assumption College”) in 1885 under the Frères de Saint-Gabriel. Now many schools, for boys and girls, have been set up under the Catholic Church in Thailand. All these schools now form part of the country’s modern school system (brief histories of the schools are available on the school websites).

³ Stephan Cleary, “Thailand’s Temple Schools”, accessed 9 October 2017, from Thai Blogs: Life, Culture and Travel in Thailand, 15 March 2009, www.thai-blogs.com/2009/03/15/thailand-s-temple-schools/

⁴ Joseph C. Liow, *Islam, Education and Reform in Southern Thailand: Tradition and Transformation*, (Singapore: Institute of Southeast Asian Studies, 2009).

⁵ The establishment of the Thai Red Cross in 1893 clearly represents the crucial role of the state (in this case the Royal Family) in spearheading the early philanthropic movement in Thailand. Indeed, in subsequent periods, “a large number of philanthropic organisations were established under royal patronage to receive funds from the people’s donation through the royal family”. Cameron Lowry, “Civil Society Engagement in Asia: Six Country Profiles – Japan, South Korea, the Philippines, Indonesia, India and Thailand”, East-West Center, Honolulu, 2008

⁶ Bernard Formoso, “Chinese Temples and Philanthropic Associations in Thailand”, *Journal of Southeast Asian Studies* 27(2), pp. 245-260 (1996).



when necessary.⁷ By the first decade of the 20th century, following the emergence of dialect associations since the late previous century,⁸ the secret societies had been in decline and progressively taken over by these new associations, which provided their members with education and healthcare, as well as cultural infrastructure, such as temples and cemeteries.

Though initially targeted at Chinese immigrants, such services, especially healthcare, were later expanded to the wider society. For example, Thian Hua Hospital (later known as Thian Fah Hospital) was erected as a collaborative project of the five major dialect groups.⁹ During its early years, the hospital, whose opening in September 1905 was graciously presided over by King Chulalongkorn (Rama V 1868-1910), offered only traditional Chinese medicine. In the 1930s, it shifted to Western-style modern medical care, though the traditional Chinese medical treatment was still available. The hospital has carried on its philanthropic mission up to the present time.

The best known philanthropic organisation set up by the Chinese in Thailand was Poh Teck Tung Foundation, which had developed from what was called a “Tai Hong Mortician Squad”. The task of this organisation was to help manage funerals, especially by providing proper burial of the dead. In 1910, a “Siamese Overseas Chinese Remittance Benevolent Foundation (Sian Hua-Ch’iao Po-Têk-Hsiang-T’üng)” was created,¹⁰ and two years later it was granted royal patronage by King Vajiravudh (Rama VI 1910-1925). The foundation’s mission then expanded to cover other philanthropic activities, and in 1937 a new name was adopted – Poh Teck Tung Overseas Foundation. One of its important public services was healthcare: in 1938, a midwifery unit consisting of only 8 beds was set up, which had carried out more than 400 birth deliveries within six months of its

⁷ Nopphanat Anuphongphat and Komatra Chuengsatiansup, “Charitable Chinese Organizations and Philanthropy in Thailand: A Historical Overview”, accessed 12 June 2017 from www.academia.edu/2004343/Draft_Charitable_Chinese_Organizations_and_Philanthropy_in_Thailand_A_Historical_Overview

⁸ The Cantonese association was set up in 1877, and similar organizations were formed by the Hainanese and Hokkien in 1900, the Hakka in 1909, and the Teochiu or Chaozhou, which was the largest Chinese dialect group in Thailand, just after the First World War.

⁹ Namely, Teochiu, Cantonese, Hokkien, Hakka, and Hainan.

¹⁰ Bernard Formoso, *supra* note 8, p. 246.

establishment.¹¹ During the Second World War, the unit was developed into a hospital – Hua Chiew Hospital – which has now become a large modern hospital in Thailand. The Foundation has also become the country’s biggest non-governmental charitable organisation.¹²

The few examples of philanthropic organisations and activities presented above are simply meant to testify to the existence of third sector movement in Thailand long before its emergence in a modern form or social enterprises in this country. Neither the religious institutions nor the charitable organisations, like Poh Teck Tung Foundation, were social enterprises in the sense used in this study. Nonetheless, representing what we call the traditional third sector organisations, they were closely related to the social enterprise as we know it in Thailand today. In particular, Thai social enterprises have clearly inherited the “philanthropic spirit” of the early voluntary organisations.

The proliferation of voluntary associations and philanthropic organisations from the early 20th century naturally gave rise to the need for their regulation. From about the mid-1920s, legal frameworks were put in place to govern various types of organisations, beginning with the Civil and Commercial Code of 1925, which places associations and foundations as non-profit within its regulatory framework. These two types of non-profit entities were to become the mainstay of the non-profit sector in Thai society. Three years later, a law on cooperatives was issued, and in a more recent past, a number of Acts were promulgated to govern other types of organisations, particularly the Trade Association Act of 1966, the Chamber of Commerce Act of 1966, the Labour Relations Act of 1975, and the Community Enterprise Promotion Act of 2005.

The purpose of issuing all these laws was to regulate associational activities of various types. However, the laws were also clearly aimed to promote such activities. For example, the Cooperatives Act of 1999 has significantly contributed to the development of this type of enterprise, whereas the Community Enterprise Promotion Act is aimed to support associational activities at the community level with a view to enabling local communities to stand on their own feet.

¹¹ Nopphanat Anuphongphat and Komatra Chuengsatiansup, *supra* note 9, p. 14.

¹² Hua Chiew Hospital, “History of Hua Chiew Hospital,” accessed 10 November 2017, from <http://www.hc-hospital.com/about.html>.



The development of another type of organisations should be mentioned in some detail here – i.e. the non-governmental organisations (NGOs). The initial rise of NGOs in Thailand was closely associated with the state-sector role in national development. Despite the important role of the traditional third sector, in modern Thailand, the state sector has been dominant.¹³ The role of the third sector has thus been significantly shaped by the change in the country's political and public-policy environments.

A major change took place in the early 1960s, when Thailand introduced its first national development plan in 1961. The whole decade after this date can be characterised as a “state-led development” period.¹⁴ It is this decade that witnessed the appearance of what is generally regarded as the first indigenous NGO in Thailand – i.e. the creation of the “Foundation for Thailand Rural Reconstruction Movement under Royal Patronage” in 1967. The person who was instrumental in setting up this foundation was Dr. Puey Ungpakorn, then Governor of the Bank of Thailand and Dean of the Faculty of Economics, Thammasat University.

The 1960s was actually the UN's “First Development Decade”. It was thus the time when international and domestic NGOs shifted their focus to furthering national development. Their orientation accordingly changed from being “social welfare workers” to “social development workers”.¹⁵ In Thailand, the UN agencies encouraged the government to develop cooperation between the state and NGOs.

A crucial political change occurred in the early 1970s, which resulted in the expansion of not only the number and role of NGOs but also those of third-sector activities and organisations in general. This was the rise of democracy following the student uprising in October 1973, which led to the fall of the military dictatorship that had ruled Thailand since the early 1960s (the military had actually dominated Thai politics since about the late 1940s). Farmers' groups and student activism, in particular, were on the rise, together with various kinds of NGOs. Although the roles of these organisations and groups suffered a decline with the return of military rule

¹³ Juree Vichit-Vadakan, “Central Role in Development for Thai NGOs?”, accessed 3 October 2017 from Global Policy Forum, 2001, www.globalpolicy.org/component/content/article/176/31191.html

¹⁴ Theerapat Unsuchaval, “Civil Society and Non-governmental Organizations (NGOs) in Thailand: History, Politics and State-Society Relations”, (Master's dissertation, University of Kent, 2015), pp. 6-7.

¹⁵ *Ibid*, p. 6.

in the latter half of the 1970s, the following decade witnessed still another important public-policy change.

The change involved a formal recognition of the traditional third sector role in promoting national development. The move in this direction was most evident from the mid-1980s onwards. One of the early indications of such a recognition occurred in 1984, when the Thai government set up the Village Development Fund Project to cater for NGO involvement in rural development.¹⁶ This acceptance of NGO involvement was reaffirmed by the introduction of the Sixth National Economic and Social Development Plan (1986-1990) with its focus on rural development. The Plan formally recognized the contributions of NGOs in national development.¹⁷

By the late 1990s the contributions of NGOs to development were well-recognized alongside their role as development partners. Their role increased even further when the 1997 economic crisis set in...the crisis showed the need to emphasize even more the importance of mobilizing local communities and grassroots organizations.¹⁸

The role of NGOs and other types of third-sector groups and organisations continued to expand well beyond the 1990s. Toward the end of this decade, Thailand severely suffered from the Asian Financial Crisis; however, the country also experienced what may be regarded as a major political milestone – the adoption of a new constitution in 1997, which was dubbed the People’s Constitution. Among its other provisions aimed to promote democratic development, the Constitution enshrined the people’s rights to unite and form associations, farmers’ groups, NGOs, cooperatives or unions – this is not to mention the right to form a political party.¹⁹

¹⁶ Brenda Furugganan and Mario Antonio G. Lopez, “Building Partnerships between Government and Civil Society: The Case of Paiboon Wattanasiritham and the Governmental Central Bank – A Study of Bridging Leadership in Thailand Produced in Cooperation with the Asian Institute of Management”, 2002, accessed 4 October 2017 from https://www.synergos.org/sites/default/files/media/documents/2004-bl-c_5_case_study_khun_paiboon_wattanasiritham_thailand.pdf

¹⁷ *Ibid*, p. 4.

¹⁸ *Ibid*.

¹⁹ Borwornsak Uwanno and Wayne D. Burns, “The Thai Constitution of 1997: Sources and Process”, *University of British Columbia Law Review* 32, pp. 227-247 (1998).



Thailand has since then still experienced occasional setbacks caused by adverse political events and developments. Nevertheless, we may say that the political and public-policy environments have so far become favourable to the development of third-sector activities and organisations. It is important to note that by the early 2000s, social enterprises in their modern form had begun to make their appearance. So now I would like to turn to the two issues raised above – i.e. how have social enterprises as we know them today emerged, and how can we make a distinction between them and traditional third-sector organisations?

2.2 The Emergence of Social Enterprises in Thailand

In the mid-1970s, when the traditional third sector was experiencing a significant growth following the rise of democracy, a crucial development in this sector also took place. This involved the reliance of certain third-sector organisations on earned revenue rather than grants and donations. The organisation that pioneered this approach was the Population and Community Development Association (PDA). Founded in 1974 as an NGO in a non-profit legal form, it initially focused on assisting the government's family planning promotion effort. However, it has since expanded its interests to cover many activities.²⁰ PDA may thus be regarded as a prototype of Thai social enterprises, which already emerged at the time when the modern concept of social enterprises had hardly taken shape. Its adoption of the earned income approach may be taken to represent an early attempt at what I elsewhere call the *transition and adaptation* within the traditional third sector.²¹ Its significance lies in the fact that when a shift to the earned income became necessary for a large number of organisations of this type, there already existed a well-established practice for them to follow.

The growth of the traditional third-sector organisations from about the early 1970s to the next decade was followed by an inflow of overseas funding support

²⁰ Its current activities include primary healthcare, HIV/AIDS education and prevention, water resource development and sanitation, income-generation, environmental conservation, small-scale and rural enterprise promotion, gender equality, and education and youth development.

²¹ Prapin Nuchpam and Chanya Punyakumpol, "Social Enterprise Landscape in Thailand", Liege: The International Comparative Social Enterprise Models (ICSEM) Project [forthcoming 2019].

for many organisations within this sector.²² It can thus be said that such support significantly contributed to the development of the traditional third sector in Thailand. Although, by about the 1990s, organisations of this type had increasingly sought domestic sources of financial support, the moment of truth came when overseas sources of funding began to dry up.

The availability of foreign funds in the early years may have inadvertently prevented Thai NGOs from seeking funding locally. It was only when Thailand was declared by foreign donors to be “well on its way”, “comfortable”, “high growth”, etc. that Thai NGOs awoke to the harsh reality of withdrawal of donor support [...] As a result of this drying up of externally derived funds, some NGOs embarked on mobilizing local resources, with mixed results; others attempted to develop sources of earned income, while others downsized or shut up shop altogether.²³

The funding challenge facing traditional third-sector organisations is a common experience of non-profit and philanthropic organisations all over the world, which still rely on grants and donations. For many of them, the shift to earned income was inevitable, and this was a major aspect of the process of transition and adaptation within the third sector. In Thailand, this process may be presumed to have been facilitated by the existence of the practice established by PDA.

As the most diversified NGO in Thailand, PDA is completely self-sustaining mainly through its own business, Cabbages & Condoms, whose profits have funded PDA’s social development programmes. PDA’s another business activity is its Business for Rural Education and Development (BREAD). By offering a logistics framework allowing Thailand’s rural poor to sell products and handicrafts to an international market, hence empowering them by income generation, BREAD at the same time provides PDA with funding to maintain its financial viability. It also provides professional consulting, such as CSR advisory services.²⁴

²² The main support was from British Council, Ashoka, and UnLtd. Prapin Nuchpam, “A Comparative Study of Legal Forms for Social Enterprises in the UK and Thailand”, (Ph.D. dissertation, Durham University, 2016), pp. 214-221.

²³ Cameron Lowry, *supra* note 7, p. 79.

²⁴ Prapin Nuchpam, *supra* note 24, pp. 210-211.



The relevance of such a practice to the rise of social enterprises in Thailand can hardly be over-emphasised. The practice actually represented what Defourny and Nyssens call an “entrepreneurial non-profit” model,²⁵ and as such it provided an orientation for those who wanted to follow in its footsteps (understandably, not all traditional third-sector organisations have done so). It must be pointed out that while the story of PDA is particularly relevant to the development of Thai social enterprises, this development also has its external as well as other domestic aspects. By the 2000s, social enterprises had become a worldwide trend, whose impacts on the traditional third sector in Thailand could be expected. Indeed, by that time (or actually well before that) Thai social entrepreneurs had already benefited from their external support networks. On the domestic scene, by the 2010s, a public-policy infrastructure for social enterprises had begun to be laid down.

Nonetheless, in my view, it is the transition and adaptation within the traditional third sector that have been particularly relevant to the emergence of social enterprises in Thailand. Indeed, looking at its emergence in this way, we can argue that social enterprises in Thailand have emerged as a new entrepreneurship from within the third sector, in much the same way as the emergence of social enterprises in the Western world.²⁶

2.3 The Distinction between Social Enterprises and other Third-sector Organisations

How can we make a distinction between social enterprises and other third-sector organisations? To answer this question, I shall first take a brief look at the traditional third sector as it has evolved to this day: what are the main types of the traditional third-sector organisations, and how, despite their similarity, do these organisations differ from social enterprises? Confusion may arise here. Many traditional third-sector organisations have assumed legal forms, which serve to

²⁵ Jacques Defourny and Marthe Nyssens, “Fundamentals for an International Typology of Social Enterprise Models”, ICSEM Working Papers, No. 33, Liege: The International Comparative Social Enterprise Models (ICSEM) Project, 2016, p. 12.

²⁶ Jacques Defourny, Lars Hulgård and Victor Pestoff (eds.), Social Enterprise and the Third Sector. Changing European Landscapes in a Comparative Perspective. (London and New York: Routledge, 2014).

designate their organisational types. For example, under the Civil and Commercial Code, there are two types of non-profit organisations, namely, associations and foundations. The cooperative is governed by its own law – the Cooperative Act – which designates its various organisational types. However, operating under the Community Enterprise Promotion Act, a community enterprise may or may not take a particular legal form. Moreover, still another type of third-sector organisations can be identified – that of public-sector spin-offs. Organisations of this type are mostly non-profit with strong public-sector support, before they become financially viable. According to Defourny and Nyssens, if such organisations opt to operate as social enterprises, they may be called, entrepreneurial non-profits.²⁷

As I have indicated above, not all traditional third-sector organisations have followed the path charted by PDA. Most of them have actually continued to operate as organisations of this traditional type: for example, not many cooperatives have transformed themselves, through the process of transition and adaptation, into “social cooperatives”, another type of social enterprise as designated by Defourny and Nyssens.²⁸ It is thus sometimes difficult to distinguish a traditional third-sector entity from a social enterprise.

A simple way to do this is to see whether a third-sector organisation is less dependent on grants and donations and more entrepreneurial in its orientation. However, Defourny and Nyssens have introduced the “interest principles” (general interests, mutual interests, and capital interests) to distinguish traditional third-sector organisations from social enterprises. In short, they have pointed out how social enterprises, as hybrid organizations, are located between these interests – i.e. between the general interest of associations, the mutual interest of cooperatives, and the capital interest of for-profit organisations.²⁹

From the Defourny and Nyssens scheme for identification of social enterprises, four major types of them can be found, namely, the entrepreneurial non-profit, the social cooperative, the social business, and the public-sector social enterprise. In Thailand, we can find social enterprises of all these types. From my point of view, these are third-sector organisations that have followed in the

²⁷ Jacques Defourny and M. Nyssens, *supra* note 27, p. 12.

²⁸ *Ibid*, p. 13.

²⁹ *Ibid*.



footsteps of PDA: non-profits such as associations and foundations that have opted to operate in an entrepreneurial mode; cooperatives that have expanded their interests to cover the general public; for-profit organisations, such as limited companies and partnerships that have adopted a social mission; and public-sector spin-offs that have become financially viable. I cannot go into detail about all these major types of Thai social enterprises. I hope nevertheless that this section has given a sufficient background for the consideration the government's attempts to regulate the social enterprise sector.

3. GOVERNMENT'S ATTEMPTS TO REGULATE THAI SOCIAL ENTERPRISES

We have seen how what I have called the traditional third sector has evolved in Thai society in the previous section. Social enterprises in Thailand actually form part of this third sector. However, there is still limited³⁰ and not up-to-date³¹ academic literature on the social enterprise sector itself: knowledge about its size, role, growth as well as law remains inadequate.³² Despite such limitations, recent attempts by the Thai Government to promote the social enterprise sector show that the sector is growing in size and importance. In this section, I shall analyse these attempts, most notably in the form of the introduction of the draft legislation on social enterprise promotion. The main issue is whether these government's attempts would likely result in promoting the social enterprise sector, or rather restricting it

Before considering the draft legislation on social enterprise promotion (hereafter "SE Bill"), I would like to review the very first attempts to regulate the Thai social enterprise sector, which began during the Abhisit Government (2008-

³⁰ Both theoretical and empirical research on social enterprises in Thailand is still lacking. Most works mainly provide a basic understanding of social enterprises and attempt to clear some confusion as to whether social enterprises are different from CSR, charity, etc.

³¹ There were a few research projects aimed to categorise social enterprise models, e.g. *Thailand Social Enterprise 50* (2010) and *SE Catalog* (2012), which were supported by the Thailand Social Enterprise Office (TSEO). However, former TSEO director, Nutthaphong Jaruwannaphong, admitted that some information is outdated and some social enterprises on the lists are no longer considered social enterprise.

³² Prapin Nuchpam, *supra* note 24, pp. 42-45.

2011) with the establishment of the Thai Social Enterprise Office (TSEO) in 2010 and the introduction of the first legal definition of social enterprise in 2011. TSEO was set up under the Thai Health Promotion Foundation Regulations on the Setting up of the Thai Social Enterprise Office B.E. 2553 (2010). Its role was not that of a regulator, but rather a facilitator with three main goals: (1) to create awareness and knowledge about social enterprise in Thailand; (2) to develop models and potential of social enterprises; and (3) to increase access to finance for social entrepreneurs.³³ TSEO was dependent on funding from the Ministry of Public Health; in other words, it was under strict rules and bureaucracy. This is one of the causes of the shutdown of TSEO during the Yingluck Government (2011-2014) without any organisation taking its place. The lack of policy continuity implementation due to political instability is one of the main obstacles to the development of social enterprise sector in Thailand. The role and support of TSEO during the Abhisit regime could be said to incubate social enterprises in Thailand.

The first legal definition of social enterprise was stipulated in Regulation 3 of the Office of the Prime Minister's Regulations on National Social Enterprise Promotion B.E. 2554 (2011)³⁴ (hereafter "SE Regulations") as follows:

"Social enterprise" means the activity of the private sector, either as an individual, a group of individuals, or the community, who engages in a venture or an operation with clear objectives at the very beginning of mainly solving the problems of, and developing, the community, society and the environment, generates revenue from the sale and production of goods, or provision of services, which is not meant at maximising profits for the shareholders or owners of the venture or the operation, and has the following characteristics:

- (1) relying on the production process and operation in providing goods and services that do not cause any permanent or long-term damage to popular well-being, society and the environment;
- (2) making use of the philosophy of sufficiency economy;

³³ Thailand Social Enterprise Office (TSEO) (2010), Master Plan for the Promotion of Social Enterprise 2010-2014.

³⁴ Royal Gazette, Vo. 128, Special Part 55 D, 18 May B.E. 2554 (2011), p. 1.



- (3) having a potential for financial viability;
- (4) reinvesting most of the profits in expanding the business to achieve its objectives of solving the problems of, and developing, the community, society, or the environment, or returning those profits to society;
- (5) being able to operate in various organisational structures; and
- (6) having good governance.

The term “social enterprise” seems to be loosely defined, reflecting the vast and varied nature of social enterprise (as we can see from the various examples of third-sector organisations in the previous sections), while at the same time emphasising its defining characteristics, particularly, the social and the economic and entrepreneurial dimensions of social enterprises. Like Thailand, many European countries have chosen to have a legal definition of and criteria for social enterprises in their national laws or regulations.³⁵ Though providing a legal definition of social enterprise is not uncommon, it is not an easy task considering the diverse nature of the social enterprise sector. One of the difficulties in defining a social enterprise is to differentiate it from traditional non-profit and for-profit organisations, since social enterprises are considered not-for-profit organisations.³⁶ The UK’s Community Interest Company (CIC), a specially-designed legal form for social enterprise, provides special characteristics of CIC, which are different from those of for-profit companies. For example, CICs are required to have social objectives, dividend cap and social reporting.³⁷

On the one hand, the official definition helps clarify and differentiate social enterprises from for-profit and non-profit organisations. Such legal status works as a legal brand for social enterprise. On the other hand, a legal definition generally requires strict interpretation, meaning all the requirements/criteria for being social

³⁵ European Center for Not-for-Profit Law, “Comparative Analysis of the Regulatory Framework for Social Enterprises”, 2015, accessed 5 June 2018 from <http://ecnl.org/wp-content/uploads/2015/10/ECNL-Comparative-analysis-on-regulation-of-SE-Eng-2015.pdf>.

³⁶ Justice Connect Not-for-profit Law, “What does ‘Not-for-profit’ Mean? – Legal Information for Community Organisations”, 2014, accessed 5 June 2018 from https://www.nfplaw.org.au/sites/default/files/media/What_does_not-for-profit_mean_1.pdf

³⁷ GOV.UK, “Community Interest Companies: Guidance Chapters”, 2017, accessed 5 June 2018 from <https://www.gov.uk/government/publications/community-interest-companies-how-to-form-a-cic>

enterprise must be satisfied.³⁸ Since the third sector and the social enterprise sector are very diverse, comprising various players and stakeholder groups, it is difficult to include them all in one definition. Exclusions of some groups could affect the growth of both sectors in the long term. The UK government therefore decided not to incorporate any legal definition of social enterprise in its laws.³⁹

Ironically, the important attempts to formalise and legalise the operations of Thai social enterprises were initiated during the military government led by General Prayuth Chan-ocha (2014-present). The most significant initiative is the drafting of the Social Enterprise Promotion Act B.E. ..., of which the rationale is given as follows:

Though many private enterprises and activities are aimed at solving the problems of, and developing the community, society or the environment, these socially oriented enterprises and activities have not yet sufficiently benefited from the state sector. Therefore, in order for the support provided in such a manner for the community and society by private entrepreneurs to proceed efficiently, and to contribute to the reduction of social inequalities, measures in various areas should be worked out with a view to encouraging a greater number of private entrepreneurs to engage in socially oriented enterprises and activities. It is also necessary to provide for coordination, promotion, and cooperation by various sectors, such that these efforts result in the problems affecting the community, society, and the environment being solved, and the community, society and the environment being appropriately and sustainably developed. In view of this situation, this legislation needs to be enacted.⁴⁰

³⁸ The philosophy of sufficiency economy was later removed as a criterion for being a social enterprise when the legal definition was proposed in the SE Bill. Requiring that every Thai social enterprise make use of the philosophy of sufficiency economy is illogical since this would further restrict the way a social enterprise pursues its varied objectives. Prapin Nuchpiam, "Law and the Development of Social Enterprise as an Alternative Way of Achieving Sustainable Development under the Philosophy of Sufficiency Economy", NIDA National Conference on Sufficiency Economy and the Development Administration: From Philosophy to Practice, Bangkok: National Institute of Development Administration (NIDA) (2017), pp. 997-1018.

³⁹ European Center for Not-for-Profit Law, *supra* note 37, p. 7.

⁴⁰ National Reform Council, Special Agenda 1: Social Enterprise. (Bangkok: Secretariat of the House of Representatives, 2015), p. 61.



The rationale seems to clearly reflect the nature of social enterprise; that is, it is an enterprise with social objectives, operating in an entrepreneurial manner, including various groups (third-sector organisations); and obtaining sustainable results and impacts. Following such a rationale, the SE Bill is aimed at developing the social enterprise sector in three main areas: first, the provision of the legal definition and the certification system in support of the growth of the sector; second, suitable measures for creating the sustainable development of the sector; and finally, mechanisms to efficiently drive the operation of social enterprises, especially the establishment of “the National Social Enterprise Promotion Office”,⁴¹ which will work as both the facilitator and the regulator of the sector. This paper is unable to cover all of the three areas, but will focus mainly on the legal definition, and will also touch upon the tax measures for social enterprises. This should be sufficient to give a clearer picture of how Thai social enterprises would be regulated in the near future, and whether the law could really embrace the nature of social enterprise as designated in the rationale.

There are three versions of the legal definitions of social enterprise: the first one was proposed by the National Reform Council in 2015 (hereafter “Original Version”);⁴² the second was proposed at the public hearing⁴³ on 26 July 2017 (hereafter “Public Hearing Version”); and the third definition was proposed after the public hearing by the Law Reform Advisory Committee in September 2017 (hereafter “Law Reform Version”). It should be noted that there is one more definition of social enterprise stated in the Royal Decree Issued under the Revenue Code in Relation to Tax Exemption (No. 621) B.E. 2559 (2016) (hereafter “Royal Decree on SE Tax Benefit”),⁴⁴ which is the same as that of the Public Hearing Version. This latter version was actually released after the issuance of the Royal Decree on SE Tax Benefit, which was authorised by the Ministry of Finance. With different people and organisations proposing different definitions, it is understandable why the SE Bill enactment process is time consuming and suffering from bureaucratic red tape. We shall consider the tax measures later in this section.

⁴¹ This is to replace and continue the work of TSEO, which was shut down.

⁴² National Reform Council, *supra* note 42, pp. 61-78.

⁴³ The public hearing is required for any law makings and amendments according to Section 77 of the Constitution of Thailand of 2017.

⁴⁴ The Royal Gazette, Vol. 133, Part 76 A, 30 August B.E. 2559 (2016), p. 13.

Let us start with the legal definition of social enterprise proposed by the National Reform Council in 2015. Social enterprise in this Original Version is defined as follows:

A legal person, who produces goods, provides services, or engages in other activities in the private sector, with a clear objective at the very beginning of mainly solving the problems of, and developing, the community, society and the environment, and not that of principally maximising profits for the shareholders or owners, and with the following special characteristics:

- (1) setting social objectives as the main purpose of the venture;
- (2) having a potential to become financially sustainable;
- (3) relying on the production process and operation in providing goods and services that do not cause any continuing or long-term damage to society, popular well-being, and the environment;
- (4) reinvesting most of the profits in expanding the business to achieve its stated objectives, or returning those profits to society or its consumers; and
- (5) having good governance.⁴⁵

This version seems very similar to the definition provided by the SE Regulations with a slight change in the special characteristics (the philosophy of sufficiency economy was removed). Moreover, this new version is clearly aimed to reflect the true nature of social enterprise, such that administrative arrangements for public-sector support to promote the social enterprise sector would be clear and easy to make. We hope to find an answer for this later. However, the significant change found in the Original Version is the term “legal person”, which means social enterprises must be set up as a legal entity, i.e. companies, partnerships, foundations or associations. In other words, social enterprises as individuals, i.e. sole traders, unincorporated associations or general partnerships, are not allowed to apply for support under the SE Bill.

The Public Hearing Version instead has provided a shortened and more specific definition of social enterprise with all of the special characteristics being omitted. Social enterprise is defined as:

⁴⁵ [Emphasis added].



A company or a registered/limited partnership, set up under Thai law with the objective of engaging in the sale of goods or provision of services and promoting employment in the local community where the social enterprise is located; or with a clear objective at the very beginning of mainly solving the problems of, and developing the community, society and the environment without the goal of maximising the profit for the shareholders and partners, and reinvesting not less than 70 percent of the profit in its business, or using it for the benefit of farmers, the poor, the disabled, the underprivileged, or for other common benefits to be designated by a ministerial announcement.⁴⁶

There are two major changes in this version: first and foremost, a social enterprise must be set up as either a company or a registered/limited partnership;⁴⁷ and at least 70 per cent of the profits must be reinvested in the business of social enterprise or returned to society for public interests; in other words, limits are imposed on the distribution of profits to investors (i.e. shareholders and partners). This definition is very strict and specific in terms of who can enter the social enterprise sector and how the profits of social enterprise must be arranged.

What does this Public Hearing definition hope to achieve? Does it reflect the nature of social enterprise? The answer is definitely in the negative. Would it promote the sector? As it stands, it seems mainly to benefit among companies and partnerships. Would the restriction on profit distribution attract shareholders and partners? Clearly, this would not attract for-profit investors who expect profit maximisation. However, this is probably attractive to social investors who value public benefit. Would it provide the government with ease of managing the sector? The government probably finds it easier to manage the sector since there are only two main groups (companies and partnerships) to look after, which are also registered on public record. But would it provide the same benefit for those running a social enterprise? The benefit is probably not the same for those who only aim for the privilege under the SE Bill, but it is probably acceptable to true social entrepreneurs. Many more questions may be raised, for example, why does it have to be 70 per

⁴⁶ [Emphasis added]

⁴⁷ Under the Civil and Commercial Code, there are two types of partnership in Thailand: (1) general partnership; and (2) limited partnership. However, a general partnership can be registered as a legal person called 'registered partnership'.

cent? If such a percentage is required as part of the legal definition, would this not make any amendment difficult?

Nevertheless, it is obvious that the definitions of social enterprise proposed in the Original and the Public Hearing Versions provide stricter interpretation and exclude even more players from the social enterprise playing field than the definition of the SE Regulations. It is also evident that the scope of the definitions seems to be progressively narrower from “an individual, a group of individuals, or the community” in the SE Regulations to “a legal person” in the Original Version, and “a company or registered/limited partnership” in the Public Hearing Version. In addition, those (both juristic and natural persons) not being approved as social enterprises under the SE Bill are not allowed to use the term “social enterprise” for their business.⁴⁸ Using such a term without permission is subject to imprisonment, or fines, or both.⁴⁹ Both the Original and the Public Hearing Versions have the same penalty sections. As we shall see below, simply using slightly different terms these definitions could vastly result in different legal implications/effects.

If the Public Hearing Version was approved, would this mean that those who wished to set up a social enterprise would be left with only two options: being either a company or a partnership under the Civil and Commercial Code? Or could we simply interpret that an individual is not permitted to operate a social enterprise under the SE Bill? It would mean that even though a social enterprise may be started by one person,⁵⁰ for example, by a person acting as a resource person providing poor or underprivileged children with useful knowledge, that person, operating as a social entrepreneur and wishing to benefit from support under the SE Bill, has to register as a one-person company.⁵¹ This is not just a simple formality but involves matters,

⁴⁸ Section 8 of the draft Social Enterprise Promotion Act B.E. ...

⁴⁹ Section 53 of the draft Social Enterprise Promotion Act B.E. ...

⁵⁰ UK allows a sole trader to run a social enterprise. See Heidi Fisher, “Can Social Enterprises be Sole Traders”, 2018, accessed 28 April 2018 from <https://makeanimpactcic.co.uk/2018/02/can-social-enterprises-be-sole-traders/>

⁵¹ It is currently not possible to set up a one-person company in Thailand. To set up a company, there needs to be at least three founding shareholders whereas setting up a partnership requires at least two partners. Department of Business Development, “Company Limited Registration according to the Civil and Commercial Code”, 2017, accessed 14 November 2017 from www.dbd.go.th/dbdweb_en/ewt_news.php?nid=3966&filename=index



such as the registration process and fees, as well as the preparation of an annual report. It would be fair for that person if he or she aims to expand his or her business in the future. It would be a little burdensome at start-up, but might be worth the effort in view of the support to be given under the SE Bill.

In case of a social enterprise that has engaged in socially beneficial activities for quite some time – i.e. well before the promulgation of the Social Enterprise Promotion Act, and has thereby become well known as a social enterprise, its operator might not see the need for support. The problem in such a case is that this particular social enterprise operator will not be entitled to engage in social enterprise activities and claim that he or she is a social entrepreneur, because he or she risks being punished by the law which has come out much later than the time when his or her social enterprise came into being. So, what is the role of the law here? Does the legal definition promote or restrict the social enterprise sector?

Let us consider another example. If a juristic person other than a company or partnership, for example, a co-operative, would like to apply for the support under the SE Bill, there probably would be two options available – to change its legal form from the co-operative to the company or partnership; or to set up the company or partnership as a subsidiary. The former choice would be difficult since a cooperative gives precedence to the members over shareholders or partners.⁵² Convincing all members to change their legal status in contrast to the cooperative values and principles would not be easy and the winding up process would be complicated. The latter option might be probable, but it could be costly.

The legal definition proposed by the Public Hearing Version might be likely to attract new investors entering the social enterprise sector, but might be rather restrictive to individuals and organisations other than companies and partnerships, as well as to social enterprises which have been in existence well before the promulgation of the social enterprise law and have thereby been publicly recognised as such. This would obviously exclude many players, for example, sole traders, cooperatives, associations, foundations, among others, from the sector. The privilege of using the social enterprise status and obtaining government's support and

⁵² Peter Suter and Markus Gmür, "Member Value in Co-operatives", Working Papers SES 444, 2013, Faculty of Economics and Social Sciences, University of Fribourg (Switzerland).

incentives is reserved exclusively for companies and partnerships. Why do the law and policy makers see it necessary to strictly define social enterprises?

An argument in favour of a strict definition is normally based on the need to prevent those who might want to benefit from the social enterprise law without any real intention to contribute to social welfare or popular well-being from doing so. The adoption of a narrow definition of social enterprise might help screen out a number of prospective social entrepreneurs, with only those deserving support under the law being left for consideration for such support. This might also make close supervision possible (i.e. focusing on quality not quantity), because registration as a limited company or registered/limited partnership amounts to crucial screening in the first place. However, a very clear disadvantage of adopting a narrow definition is that this results in excluding other types of organisations: not only might such a practice affect the growth of the social enterprise sector, but it is also in conflict with the nature of social enterprise, whose main characteristic is its diversity and being an organisation of a hybrid type. Since social enterprises consist of various types, a focus on limited companies and partnerships alone clearly amounts to providing support for only one group of organisations, especially the social business group. The law should support the whole sector. This clearly contradicts the rationale of the law.

We might want to ask further why the private sector (e.g. companies and partnerships) seems to be favoured over other organisations. This can be seen from the definition of social enterprise in the SE Regulations and in the Original Version. They both clearly use the term “private sector”. I believe this is not about favouritism, but rather involves the intention to show that a social enterprise in Thailand is seen as a business, but not just a normal business that maximises profit. It is a business with *social mission*. In fact, such a concept is probably influenced by the social enterprise movement in the UK. This is hardly surprising since the British Council has played a significant role in promoting social enterprises in Thailand. However, in its effort to promote social enterprises, the UK ended up not providing any legal definition at all.⁵³

⁵³ The UK's Department of Trade and Industry (DTI) at the time tried to define social enterprise as a business with social mission. However, they later decided not to provide any legal definition of social enterprise since it would exclude many players from the sector. Simon Teasdale, “What's in a Name? Making Sense of Social Enterprise Discourses”, *Public Policy and Administration* 27(2), (2011), pp. 99-119.



Or it could probably be that it would be easier to promote the business side of social enterprises first since the company and partnership law are very well established in Thailand. In addition, many Thai people are familiar with the concept of corporate social responsibility or CSR (to be further mentioned in the conclusion), which they consider it similar to social enterprises.⁵⁴ Also, the private sector has better access to financial resources than the non-profit sector does, meaning that the government does not need to worry too much about its funding.

In fact, the reason why the Public Hearing Version was proposed in the first place despite the prior existence of the Original Version at the time is because of the tax incentive policy under the Royal Decree on SE Tax Benefit. This matter has resulted in contradictions in the legal and policy domains. That is, in its effort to encourage more businesspeople to invest in the social enterprise sector, the Ministry of Finance has issued a policy on tax benefit for social enterprise and those who invest in this sector. Investors in this sector are entitled to tax exemption for their ventures, whose whole profit would be returned to society and used for its benefits without any distribution to its shareholders or partners. Shareholders and partners in a social enterprise will also be entitled to tax exemption (I shall not go into detail on this point, which is highly complicated and not directly relevant to the issue I am addressing in this paper.

The problem does not involve the provision of tax benefits; a policy of this type has been applied in various cases, such as investment attraction.⁵⁵ The problem here is rather that the tax benefit measure for social enterprise was issued (the measure came into force on 30 August 2016) before the term “social enterprise” had been clearly interpreted, or actually before the law – which is yet to be promulgated. This means that the Ministry of Finance had to formulate its own definition of social enterprise. It could in fact restrict such a definition to the business group for tax benefit purposes. However, a complicated problem has arisen because the conditions qualifying a social entrepreneur for this tax benefit are those incorporated

⁵⁴ Thai CSR Network, “Do Not Confuse CSR with Social Enterprise”, accessed 17 October 2017 from www.thaicr.com/2010/06/csr-social-enterprise.html

⁵⁵ See Bruce Bolnick, *Effectiveness and Economic Impact of Tax Incentives in the SADC Region – Technical Report*. (Virginia: Nathan-MSI Group, 2004); Jacob Bundrick, “Tax Incentives and Subsidies: Two Staples of Economic Development”, 2016, accessed 17 October 2017 from Arkansas Center for Research in Economics <http://uca.edu/acre/2016/08/19/tax-incentives-and-subsidies-two-staples-of-economic-development/>

in the SE Bill, which has not yet become law, such as the requirement that his or her business must have been certified as a social enterprise by the government agency as specified by the Revenue Department Director-General⁵⁶ (which would probably mean the National Social Enterprise Promotion Office). That means even though a tax measure has been issued, in practice no social entrepreneur has been able to apply for the tax benefit, because the social enterprise law has not yet been promulgated.

Further complication has also arisen as a result of the adoption of the definition formulated by the Ministry of Finance as the definition to be incorporated in the SE Bill (the Public Hearing Version). The problem is that the SE Bill has not been designed for only *tax purposes*; it is rather aimed to promote the whole social enterprise sector – or, perhaps, even the third sector in general. In fact, the purpose of the adoption of the Finance Ministry’s definition is not particularly for the SE Bill and the tax code to have the same definition (in principle, it is the tax code that should have adopted the SE Bill’s definition, not the other way round). This is the case because the Ministry of Finance did not agree with the idea of setting up the Social Enterprise Fund under the SE Bill.⁵⁷ The reason is simple: it involves the state budget – the taxpayers’ money.

Even though tax incentive measures are attractive, they are not in conformity with the concept of tax neutrality.⁵⁸ This could affect the sustainable development of the social enterprise sector in the long term. That is, when this type of benefit is no longer available, the incentive to investment in the sector might not be available as well. The decision to invest in the social enterprise sector should come from a sense of mission or passion for the betterment of society, and not from an incentive to benefit.⁵⁹

⁵⁶ Article 8 (2) of the Royal Decree Issued under the Revenue Code in Relation to Tax Exemption (No.621) B.E. 2559 (2016).

⁵⁷ All the articles regarding the establishment of the Social Enterprise Fund proposed by the National Reform Council (Original Version) were removed from the Public Hearing Version proposed by the Ministry of Finance.

⁵⁸ Jason Furman, “The Concept of Neutrality in Tax Policy”, 2008, accessed 17 October 2017 from Testimony Before the U.S. Senate Committee on Finance Hearing on ‘Tax: Fundamentals in Advance of Reform’ www.brookings.edu/wp-content/uploads/2016/06/0415_tax-_neutrality_furman-1.pdf

⁵⁹ Thai CSR Network, “Operating a Social Enterprise Does Not Need to Wait for the Law”, accessed 17 October 2017 from www.thaicrs.com/2017/10/se.html



On the positive side, the results of the public hearing showed a strong opposition to the Public Hearing Version. Consequently, the Law Reform Version was proposed on 4 September 2017. A little bit wider definition of social enterprise was provided as follows:

“Social enterprise” refers to **a company, a partnership, or any other legal person**, set up under Thai law with the objective of engaging in the production, or sale of goods, or provision of services; or promoting employment; or solving the problems of, and developing the community, society, the health or the environment without the goal of maximising the profit for the shareholders and partners, and reinvesting not less than 70 percent of the profit in its business, or using it for the benefit of low-income people, the elderly, the disabled, the sick, the ex-convicts, or the other underprivileged, or for other common benefits, or as a return to society, in a manner to be designated by a ministerial announcement.⁶⁰

A major change in the Law Reform Version is the term “any other legal person”. This means that other legal entities, such as foundations, associations, and cooperatives are included. However, it seems that individuals are still not welcome. Though this is already the third version, it might not yet be the final one.⁶¹ The SE Bill is going to be sent for the Cabinet’s approval soon and it might be sent back to the Ministry of Finance and the Office of the Council of State for the final checks. Drafting a social enterprise law is just one but significant attempt by the Thai government to regulate the social enterprise sector, though the ultimate goal is to promote, rather than control it. From what we have seen above, no matter which word – “regulate” or “promote” – is chosen, we can hardly deny that there will be someone being affected by this. I am not saying that it is wrong to have such a law. In fact, I strongly believe that a legal framework for social enterprises is needed for the sustainable development of the sector. However, there are many ways to design a law and we should make sure that such a law would be the most beneficial to the social

⁶⁰ [Emphasis added]

⁶¹ After the Law Reform version had been released, the second public hearing was held. The result was the most recent draft legislation on social enterprise promotion, proposed by the Law Reform Commission on 15 January 2018. However, the definition of social enterprise in this SE Bill remains the same as the one in the Law Reform version.

enterprise sector as a whole. In the conclusion, I shall consider certain difficulties which could affect the promotion of social enterprise in Thailand.

4. CONCLUSION

I have been rather critical of the way Thailand's social enterprise law is being developed. A question thus arises: do we really need such a law? My answer is definitely in the positive. However, I recognise the difficulty of preparing a social enterprise law. As I have pointed out, given the vast and varied nature of social enterprises, it is extremely difficult to develop a law that governs the whole sector. European laws regulating social enterprise, most notably the UK's community interest company (CIC) and the Italian social cooperative, cover only those who have opted to operate within these specific legal vehicles. Social entrepreneurs still have the freedom to operate in any other possible legal form – or even without any legal vehicle at all.

A problem with Thailand in preparing its first social enterprise law reflects its lack of a unified working system for a particular policy area. The existence of different versions of the definition of social enterprises clearly testifies to this lack of coordination. The situation now is indeed one of uncertainty about government policy. There was a remarkable progress in public-policy support in the early 2010s. The years 2010-2011 witnessed several policy initiatives, especially the creation of TSEO in 2010, that may be said to have laid the vital public-policy groundwork for social enterprises.⁶² Though a Social Enterprise Promotion Bill has been proposed since 2015, as of early 2018 it has not yet been promulgated. Most significantly, TSEO now ceases to function, and it remains unclear if its work will be resumed, or a new agency will be set up in its place, following the passage of the Bill into law. The SE Bill of course refers to the establishment of a National Social Enterprise Promotion Office. The point is nevertheless that in a public understanding the government support for social enterprise is still far from clear.⁶³

⁶² Prapin Nuchpiam, *supra* note 24, p. 225.

⁶³ Wiwan Tharahiranchoe, "Social Enterprise: Support Still Remaining Dim", *Bangkok Business News* (9 April 2018), retrieved 28 April 2018 from <http://www.bangkokbiznews.com/blog/detail/644349>