

Thailand: Criminal liabilities of directors

A recent Act has amended provisions relating to the criminal liability of directors, managers and other persons responsible for a legal entity. Until recently the presumption was that directors, managers or responsible persons were criminally liable for criminal offences of the entities they represented. The new Act specifies the conditions under which these individuals will now incur criminal liability. This Briefing provides an overview of the changes under the new Act.

Change under the Act

The Act on Amendment of Legal Provisions relating to Criminal Liabilities of Representatives of a Legal Entity (the "Act") has amended the provisions of 76 other Acts.

- Under previous provisions it was presumed that directors, managers or other persons responsible for a legal entity (a "Representative") were criminally liable, together with the entity they represented, for offences by the legal entity.
- Now, under the Act, Representatives will only incur criminal liability if:
 - the offence by the legal entity results from the instructions or action of the Representative, or
 - the Representative has a duty to give instructions or act but he/she omits to do so, which results in such legal entity committing an offence.

Why the law was changed

This Act was introduced following several Constitutional Court cases concerning the presumption of joint

criminal liability of a Representative for an offence committed by a legal entity, as this violated the Constitution of Thailand, B.E. 2550 (1997 AD).

- Under previous Thai law, if a legal entity were prosecuted for a criminal offense, its Representative was presumed to be jointly liable with that legal entity unless the Representative could prove "*he or she was not involved in the commission of such offense*".

Landmark decision

- The landmark decision No. 12/2555 (2012 AD) by the Thai Constitutional Court on 28 March 2012 held that Section 54 of the Direct Sale and Marketing Act, B.E. 2545 (2002 AD) which presumed the Representative must be jointly liable for a criminal offence committed by a legal entity, conflicted with the principle of a presumption of innocence under Section 39 paragraph 2 of the Constitution of Thailand, B.E. 2550 (1997 AD). Section 39 paragraph 2 states, "In a criminal case, it shall be presumed that the accused is not guilty." Similar challenges have

been made with respect to similar provisions in other Acts.

- Technically, such provisions cannot be enforced as they are considered contrary to the Constitution of Thailand. However, the person charged needed to challenge the prosecution in the Constitutional Court to avoid being criminally liable under the burden of proof imposed under the relevant Acts.

The new Act

- In order to comply with the Constitution, this Act has been enacted to amend provisions in numerous Acts which violated the principle of a presumption of innocence.

Under the new Act a Representative will be criminally liable with the legal entity and subject to penalties specifically imposed by the Act only if:

- such offence results from the instructions or action of the Representative; or
- the Representative has a duty to give instructions or take action but omits to do so, which results in such legal entity committing an offence.

The relevant provisions in 76 Acts have been automatically amended

and replaced by provisions in line with this concept, including the following:

1. Section 35 bis and Section 90/5 of the Revenue Code;
2. Section 25 of the Act Prescribing Offences Related to Registered Partnerships, Limited Partnerships, Limited Companies, Associations And Foundations, B.E. 2499 (1956 AD);
3. Section 88 of the Patent Act, B.E. 2522 (1979 AD);
4. Section 71 of the Condominium Act, B.E. 2522 (1979 AD);
5. Section 59 of the Consumer Protection Act, B.E. 2522 (1979 AD);
6. Section 72 of the Building Control Act, B.E. 2522 (1979 AD);
7. Section 41 of the Provident Fund Act, B.E. 2530 (1987 AD);
8. Section 101 of the Social Security Act, B.E. 2533 (1990 AD);
9. Section 111 of the Enhancement and Conservation of National Environmental and Quality Act, B.E. 2535 (1992 AD);
10. Section 63 of the Factory Act, B.E. 2535 (1992 AD);
11. Section 114 of the Life Insurance Act, B.E. 2535 (1992 AD);
12. Section 108 of the Non-Life Insurance Act, B.E. 2535 (1992 AD);
13. Section 74 of the Copyright Act, B.E. 2537 (1994 AD);
14. Section 61 of the Anti-Money Laundering Act, B.E. 2542 (1999 AD);
15. Section 40 of the Accounting Act, B.E. 2543 (2000 AD);
16. Section 78 of the Telecommunications Business Act, B.E. 2544 (2001 AD);
17. Section 46 of the Electronics Transaction Act, B.E. 2544 (2001 AD);
18. Section 135 of the Derivatives Act, B.E. 2546 (2003 AD);
19. Section 141 of the Energy Industry Act, B.E. 2550 (2007 AD);
20. Section 80 of the Trust for Transactions in Capital Market Act, B.E. 2550 (2007 AD); and
21. Section 132 and Section 139 of the Financial Institution Business Act, B.E. 2551 (2008 AD).

If you have any questions in relation to any of the issues raised in this briefing please contact the authors below.

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