

Thailand

Michael Ramirez



Poomjai Kudidthaler



Tilleke & Gibbins

1 General Criminal Law Enforcement

1.1 What authorities can prosecute business crimes, and are there different enforcement authorities at the national and regional levels?

The Office of the Attorney General is an independent organisation as provided for in the Constitution of the Kingdom of Thailand. The Office's public prosecutors have the power to prosecute all criminal matters including business crimes. This is the only organisation with general criminal enforcement authority on both the national and regional level. However, some specialised crimes may involve other enforcement agencies such as the Department of Special Investigation and the Securities & Exchange Commission of Thailand (SEC). In addition, Section 28 of the Criminal Procedure Code allows for criminal charges to be filed privately by aggrieved individuals.

1.2 If there are more than one set of enforcement agencies, please describe how decisions on which body will investigate and prosecute a matter are made.

The Office of the Attorney General is the only enforcement agency with the power to criminally prosecute unless another agency is given exclusive jurisdiction by statute. The process begins with an investigation by an inquiry official who collects evidence to establish: the facts related to the alleged offense; the identity of the offender; and the guilt of the offender. The inquiry official forwards the file and opinion to the public prosecutor. The public prosecutor has the power to independently determine whether to prosecute or request an additional inquiry into the matter.

1.3 Is there any civil or administrative enforcement against business crimes? If so, what agencies enforce the laws civilly and which crimes to they combat?

The Office of the Attorney General can also civilly enforce business crimes on behalf of injured persons. The injured person must have a right to claim restitution for being deprived by the alleged offence; or have the power to apply for restitution of property/value in any of the following cases: theft; robbery; piracy; extortion; cheating and fraud; criminal appropriation; and receiving stolen property.

Some organisations have the power to administratively enforce business crimes if the matter is sufficiently relevant to the organisation's authority. For example, the Trade Competition Commission has the power to administratively enforce against

business crimes relating to unfair competition. Other organisations with such power include the Revenue Department in tax cases and the National Anti-Corruption Commission in government-contracting fraud cases.

2 Organisation of the Courts

2.1 How are the criminal courts in Thailand structured? Are there specialized criminal courts for particular crimes?

The Thai judiciary has a three-tier system: the Court of First Instance; followed by the Appeals Court; and then the Supreme Court (Dika). In Bangkok, the criminal caseload is shared among different Courts of First Instance. Alleged offenders may appear in Criminal Court, the Bangkok South Criminal Court, the Thon Buri Criminal Court or Min Buri Provincial Court, depending on the place of arrest, alleged offender's residency or origin of inquiry. In other provinces, criminal matters can be adjudicated in Kwaeng (District) courts or Jang-Wad (Provincial) courts. Kwaeng courts have the power to adjudicate criminal cases where the maximum punishment by law does not exceed three years' imprisonment and/or a 60,000 baht fine. Jang-Wad courts have unlimited original jurisdiction in all criminal matters within its own district. The Intellectual Property and International Trade court is a specialised court with exclusive jurisdiction to adjudicate criminal matters involving intellectual property.

2.2 Is there a right to a jury in business-crime trials?

There is no right to a jury trial in the Thai law system. Cases are adjudicated by judges.

3 Particular Statutes and Crimes

3.1 Please describe any statutes that are commonly used in Thailand to prosecute business crimes, including the elements of the crimes and the requisite mental state of the accused:

o Fraud and misrepresentation in connection with sales of securities

Sections 238 through 244 of the Securities and Exchange Act B.E. 2535 (1992) provide general protection against fraud and misrepresentation in connection with the sale of securities. Section 238 provides that "[no] person having an interest in the securities shall impart any false statement or any other statement with the

intention to mislead any person concerning the facts relating to the financial condition, the business operation or the trading prices of securities of a company . . . ”. The alleged offender must have intentionally misled the victim with the statement. Under Section 296, violators potentially face a maximum of two years in prison or a fine not exceeding two times the benefit received or should have been received as a result of the offence. Furthermore, the fine will not be less than five hundred thousand baht.

o Accounting fraud

Under Section 39 of the Accounting Act B.E. 2543 (2000), a person who makes a false entry, alters or neglects to make an accounting entry is criminally liable. An offender potentially faces a maximum of two years in prison and/or maximum fine of 40,000 baht. If the offender had a duty to keep accounts, he or she potentially faces a maximum of three years in prison and/or maximum fine of 60,000 baht. The requisite *mens rea* can be satisfied by showing negligence or intent to make or alter or falsify an accounting entry.

o Insider trading

Section 241 of the Securities and Exchange Act B.E. 2535 (1992) provides protection against the use of insider information in the sale or purchase of securities. The elements in Section 241 require that no person (directly or indirectly) can purchase or sell securities in such a way to take advantage of other persons by using undisclosed information material to changes in securities prices. Furthermore, the person must have accessed the information by virtue of his office or position. Alleged offenders face the same potential liability as listed in Section 296 (see fraud and misrepresentation in connection with sales of securities).

o Embezzlement

Sections 352 and 353 of the Criminal Code of Thailand provide for general protection against misappropriation. Misappropriation is being in possession of a property belonging to another person, or of which another person is a co-owner, and having a dishonest intention to convert such property to himself or a third person. More specifically, Section 3(4) of the Anti-Money Laundering Act B.E. 2542 (1999) lists embezzlement offences in its definition of “predicate offenses”.

o Bribery of government officials

Section 144 of the Criminal Code of Thailand protects against the bribery of public officials. The section requires the alleged offender to induce a government official to act, fail to act or to delay an act, which is contrary to his or her functions, by giving or offering to give property or any other benefit. Alleged offenders potentially face a maximum of five years in prison and/or a maximum fine of 10,000 baht. Government officials also face liability for malfeasance in office under the Criminal Code.

o Criminal anti-competition

The Trade Competition Act B.E. 2542 (1999) provides general protections against anti-competitive behaviour by business operators. The Act protects against both unilateral conduct and collusion including price fixing, geographic market allocation and other anti-competitive behaviour. The Competition Commission monitors and investigates potential anti-competitive behaviour and refers matters to the Attorney General who may proceed with a criminal case. The public prosecutor would have to show substantive violations of any provision in Sections 25-29 of the Trade Competition Act.

o Tax crimes

Under Section 37 of the Tax Revenue Code of Thailand, tax evasion is a fraudulent crime. Anyone who evades or attempts to evade payment of the tax and duty by falsehood, fraud, or who knowingly or wilfully furnishes false information, makes false statements,

gives false answers or produces false evidence to evade taxes is liable. Tax evaders are subject to imprisonment from three months to a maximum of seven years and a penalty ranging from 2000 baht to 200,000 baht.

o Government-contracting fraud

The Act Concerning Offences Relating to the Submission of Bids to Government Agencies B.E. 2542 (1999) is the key statute regarding government-contracting fraud. The Act has the capability of punishing either corrupt government officials or wrongful parties. The Act covers wrongful actions including avoiding fair price competition through collaboration and depriving other parties from submitting fair bids.

o Computer Crime

The Computer Crime Act B.E. 2550 (2007) provides criminal liability for computer-related crimes. The Act protects against a wide variety of computer crimes including unauthorised access, preventing access, forging computer data, damaging the computer data of a third party, etc.

o Copyright Infringement

The Copyright Act B.E. 2537 (1994) provides criminal liability for copyright infringement. Sections 27 to 31 of the Act provide a list of copyright infringement offences, but also provide for exceptions for personal use, news-related use and non-profit research.

o Money Laundering

The Anti-Money Laundering Act B.E. 2542 (1999) provides criminal liability for money laundering. Section 5 of the Act criminalises transfers or the receipt of transfers for the purpose of “concealing or disguising the original source or asset . . . ”. Under Section 60 of the Act, an alleged offender potentially faces one to ten years in prison and/or a fine ranging from 20,000 to 200,000 baht.

3.2 Is there liability for inchoate crimes in Thailand? Can a person be liable for attempting to commit a crime, whether or not the attempted crime is completed?

Yes, there is liability for inchoate crimes when the commission of an offence would have likely caused damage or injury. A person can be liable for attempt regardless of whether the attempted crime is completed under Section 80 to 82 of the Criminal Code of Thailand.

4 Corporate Criminal Liability

4.1 Is there entity liability for criminal offences? If so, under what circumstances will an employee's conduct be imputed to the entity?

Yes, there is entity liability for criminal offences. There are several corporate criminal liabilities, which deem the managing partner, president, manager or person empowered to run the business of the company to be a co-principal in the commission of the offence unless it can be proven that they took no part in the commission of such offence (i.e. acted within the scope of their authority).

4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime?

There is no personal liability for a manager, officer, or director if the entity becomes liable for a crime unless the employee acted on his personal behalf, without authority or beyond the scope of his authority.

5 Statutes of Limitations

5.1 How are enforcement-limitations periods calculated, and when does a limitations period begin running?

In a criminal case, the enforcement period begins running from the date of commission of the offence. The limitation periods range from one year up to twenty years. In case of a compoundable offence, the injured person must make a complaint within three months from the date that the offence and person responsible for such offence became known.

5.2 Can crimes occurring outside the limitations period be prosecuted if they are part of a pattern or practice, or ongoing conspiracy?

No. The limitations period begins from the date that the offence and person responsible for such offence became known. Proceedings must be initiated within the specified limitations period.

5.3 Can the limitations period be tolled? If so, how?

Yes, the limitations period can be tolled if the offender escapes or is deemed legally insane and the court gives an order to suspend the trial for a specified period.

6 Initiation of Investigations

6.1 How are investigations initiated? Are there any rules or guidelines governing the government's initiation of any investigation? If so, please describe them.

In a criminal offence, initial investigations are started by an inquiry official, but in the case of a compoundable offence, the inquiry will begin when a regular complaint has been made. The inquiry official can collect any kind of evidence to determine the facts and circumstances relating to the alleged offence, to ascertain the offender and to prove the offender's guilt.

The Criminal Procedure Code provides the rules and guidelines on inquiry proceedings. Some acts such as the Trade Competition Act provide inquiry powers to a committee or to sub-committees to investigate the commission of listed offences.

7 Procedures for Gathering Information from a Company

7.1 What powers does the government have generally to gather information when investigating business crimes?

The government has general power to gather information, issue written orders, summon witnesses to make a statement, request documents, and to enter buildings to examine or seize documents involved in the commission of the offence. However, a search warrant must be issued for the seizure of any documents as provided for in Section 69 of the Criminal Procedure Code of Thailand.

Document Gathering:

7.2 Under what circumstances can the government demand that a company under investigation produce documents to the government, and under what circumstances can the government raid a company under investigation and seize documents?

Under the law, competent government officials can issue written orders or summon persons to make statements or deliver documents. Government officials also have the power to seize documents with a proper search warrant as provided for in Section 69 of the Criminal Procedure Code of Thailand.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does Thailand recognise any privileges protecting documents prepared by attorneys or communications with attorneys? Do Thailand's labour laws protect personal documents of employees, even if located in company files?

Thailand has protections against the production of confidential documents or facts in regard to professional obligations or duties. An example would be the privilege protecting documents as prepared by attorneys, or the privilege protecting documents of employees, or any process, design or other work protected from the public by law.

However, these are not absolute privileges. The court can order the authority or person requesting privilege to explain the need for the privilege. Afterwards, the court may decide whether there is a sufficient basis to refuse the production of documents. If the court finds that the refusal is groundless, then the court can order a party to produce such evidence.

7.4 Under what circumstances can the government demand that a company employee produce documents to the government, or raid the home or office of an employee and seize documents?

A government official can demand that a company's employee produce documents under the circumstances of an investigation and also raid the home or office of an employee to seize documents with a proper search warrant as provided for in Section 69 of the Criminal Procedure Code of Thailand.

7.5 Under what circumstances can the government demand that a third person produce documents to the government, or raid the home or office of a third person and seize documents?

The government can require any person to produce documents or raid the home or office of any person and seize documents under the circumstances of an investigation with a proper search warrant as provided for in Section 69 of the Criminal Procedure Code of Thailand.

Questioning of Individuals:

7.6 Under what circumstances can the government demand that an employee, officer, or director of a company under investigation submit to questioning? In what forum can the questioning take place?

The government can demand that an employee, officer, or director

of a company or any other responsible person submit to questioning in order to ascertain the circumstances of the alleged offence. However, the questioned person has a constitutional right not to make self-incriminating statements.

7.7 Under what circumstances can the government demand that a third person submit to questioning? In what forum can the questioning take place?

The government can demand that a third person submit to questioning in order to ascertain the circumstances of the alleged offence. However, the person has a right not to make self-incriminating statements.

7.8 What protections can a person being questioned by the government assert? Is there a right to refuse to answer the government's questions? Is there a right to be represented by an attorney during questioning?

In a criminal case, a person has the right to legal counsel. In an inquiry or during a preliminary examination, a person has a constitutional right not to make self-incriminating statements. Furthermore, the questioned person is allowed to have legal counsel present at this time.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

Upon completion of an investigation, an inquiry official will refer the case file and provide an opinion on whether to prosecute to the public prosecutor. At this point, the public prosecutor has independent discretion in deciding whether to prosecute.

8.2 Are there any rules or guidelines governing the government's decision to charge an entity or individual with a crime? If so, please describe them.

After review of the inquiry official's opinion, the public prosecutor has independent discretion in deciding whether to prosecute. However, there are guidelines to aid public prosecutors on making a decision to issue a non-prosecution order. Issues covered include the filing of a lawsuit against the public interest, public order or good morals.

8.3 Can a defendant and the government agree to resolve a criminal investigation through pretrial diversion or an agreement to defer prosecution? If so, please describe any rules or guidelines governing whether pretrial diversion or deferred prosecution are available to dispose of criminal investigations.

In the Thai legal system, a criminal offence cannot be resolved through pre-trial diversion or an agreement to defer prosecution. However, the offence may be settled upon agreement with the public prosecutor.

8.4 In addition to or instead of any criminal disposition to an investigation, can a defendant be subject to any civil penalties or remedies? If so, please describe the circumstances under which civil penalties or remedies are appropriate.

A defendant can also be subject to civil penalties or remedies. A public prosecutor may apply for restitution of property or of the deprived value on behalf of the injured person. The injured person must have been deprived through the offence of theft, snatching, robbery, gang-robbery, piracy, extortion, cheating and fraud, criminal misappropriation or receiving stolen property.

9 Burden of Proof

9.1 For each element of the business crimes identified above, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

In general, the burden of proof is on the prosecutor in a criminal case unless stated otherwise in the law.

9.2 What is the standard of proof that the party with the burden must satisfy?

The prosecutor has the burden of proof to prove the crime beyond a reasonable doubt.

9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof?

The judge is the arbiter of facts and determines whether a party has satisfied its burden of proof.

10 Conspiracy / Aiding and Abetting

10.1 Can a person who conspires with or assists another to commit a crime be liable? If so, what is the nature of the liability and what are the elements of the offense?

Under Section 83 of the Criminal Code of Thailand, a person can be liable for conspiring or assisting another with a crime. If a person is a participant or conspired in the commission of the offence, he or she is considered a principal and will be subject to the full punishment of the offence.

11 Common Defences

11.1 Is it a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime? If so, who has the burden of proof with respect to intent?

Section 59 of the Criminal Code of Thailand requires intent for criminal liability unless the law provides for negligence or strict liability. The prosecutor has the burden of proof to prove intent beyond a reasonable doubt.

- 11.2 Is it a defence to a criminal charge that the defendant was ignorant of the law i.e. that he did not know that his conduct was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the law?**

Under Section 64 of the Criminal Code of Thailand, ignorance of the law is not an excuse for criminal liability. However, the court may take it into account and provide lighter punishment.

- 11.3 Is it a defence to a criminal charge that the defendant was ignorant of the facts i.e. that he did not know that he had engaged in conduct that he knew was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the facts?**

Under Section 62 of the Criminal Code of Thailand, ignorance of facts may be a defence. If the defendant mistakenly believed a fact existed, then the defendant may not be guilty, may be exempt from punishment, or may receive a lighter punishment. However, the defendant may still be liable if the mistake of fact was due to the defendant's negligence.

12 Voluntary Disclosure Obligations

- 12.1 If a person becomes aware that a crime has been committed, must the person report the crime to the government? Can the person be liable for failing to report the crime to the government?**

There is no obligation to report a crime to the government and a person will not be liable for failing to report the crime.

13 Cooperation Provisions / Leniency

- 13.1 If a person voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person, can the person request leniency from the government? If so, what rules or guidelines govern the government's ability to offer leniency in exchange for voluntary disclosures or cooperation?**

The government cannot offer leniency in exchange for voluntary disclosure of criminal conduct or cooperation. Only the court may consider reducing the punishment on an offender.

- 13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in Thailand, and describe the favourable treatment generally received.**

The court may consider reducing the punishment of an offender during the inquiry proceeding, preliminary examination or during trial. The court may also consider extenuating circumstances in determining punishment if the offender has shown repentance and has made an effort to minimise the injurious consequences of the offence or has given information for the benefit of trial. However, the court can only reduce the punishment by not more than one half.

14 Plea Bargaining

- 14.1 Can a defendant voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges, or in exchange for an agreed upon sentence?**

No, the defendant cannot voluntarily decline to contest criminal charges in exchange for reduced charges or an agreed-upon sentence.

- 14.2 Please describe any rules or guidelines governing the government's ability to plea bargain with a defendant. Must any aspects of the plea bargain be approved by the court?**

During the inquiry proceeding, a criminal matter may be settled by the alleged offender by voluntary agreement/settlement with the competent official without court approval.

15 Elements of a Corporate Sentence

- 15.1 After the court determines that a defendant is guilty of a crime, are there any rules or guidelines governing the court's imposition of sentence on the defendant? Please describe the sentencing process.**

The judge has independent discretion in sentencing the defendant. However, the judge must not go beyond the maximum punishment prescribed in relevant statutes used in prosecution.

- 15.2 Before imposing a sentence on a corporation, must the court determine whether the sentence satisfies any elements? If so, please describe those elements.**

No, if the prosecution has proved the elements of the crime beyond a reasonable doubt, then the judge may issue a sentence in compliance with the relevant statute.

16 Appeals

- 16.1 Is a guilty or a non-guilty verdict appealable by either the defendant or the government?**

Generally, an appeal can be made on both the facts and the law in regard to a guilty verdict. However, the Criminal Procedure Code of Thailand does not allow some appeals in cases where the defendant is found guilty with small terms of imprisonment. Both parties can appeal in the case of appeal on questions of law.

- 16.2 Is a criminal sentence following a guilty verdict appealable? If so, which party may appeal?**

The guilty party can appeal a criminal sentence. If needed, the Appellate Court has the power to reduce or quash the criminal sentence.

- 16.3 What is the appellate court's standard of review?**

The Appellate Court will review the summary of the facts or the points of law relied upon in the appeal. All points of law relied upon by the parties lodging the appeal must have been raised in the

Court of First Instance. The Appellate Court can consider additional evidence that it may consider itself or direct the Court of First Instance to consider if the decision is remanded.

16.4 If the appellate court upholds the appeal, what powers does it have to remedy any injustice by the trial court?

The Appellate Court can order the Court of First Instance to carry out a new trial and give a new judgment or order according to the merits of the case.



Michael Ramirez

Tilleke & Gibbins
Supalai Grand Tower, 26th Floor
1011 Rama 3 Road, Chongnonsi, Yannawa
Bangkok 10120
Thailand

Tel: +66 2653 5794
Fax: +66 2653 5678
Email: michael.r@tillekeandgibbins.com
URL: www.tillekeandgibbins.com

Michael Ramirez is a senior consultant in the dispute resolution group at Tilleke & Gibbins in Bangkok, Thailand, where he assists clients in domestic and international dispute resolution matters. Michael has held office management and consulting positions with Authur Andersen LLP and practiced with Sedgwick, Detert, Moran & Arnold in San Francisco, California, where he concentrated in areas of product liability, environmental and general civil litigation defence. In addition to serving as corporate litigation counsel, he counsels clients in risk prevention, warnings and compliance. Michael has authored several articles on dispute resolution and is a regular presenter on the subject. Michael earned a BA in Economics from the University of California, Berkeley, and his JD from the University of California Hastings College of the Law in San Francisco, California.



Poomjai Kudidthalert

Tilleke & Gibbins
Supalai Grand Tower, 26th Floor
1011 Rama 3 Road, Chongnonsi, Yannawa
Bangkok 10120
Thailand

Tel: +66 2653 5780
Fax: +66 2653 5678
Email: poomjai.k@tillekeandgibbins.com
URL: www.tillekeandgibbins.com

Poomjai Kudidthalert is a paralegal in the dispute resolution team at the Bangkok office of Tilleke & Gibbins. Since joining the firm, Poomjai has worked on a wide range of legal issues involving domestic and international dispute resolution matters. Her areas of concentration include civil litigation, products liability, and mediation. Poomjai earned her Bachelor of Laws from Ramkhamhaeng University.

Tilleke & Gibbins

Tilleke & Gibbins is the oldest and largest independent multiservice law firm in Thailand with offices in Bangkok and Phuket, as well as in Hanoi and Ho Chi Minh City, Vietnam. Established in 1890, the firm takes great pride in its 120-year history of providing high-quality advice, knowledge, and judgment to best accomplish its clients' objectives.

Tilleke & Gibbins engages in a diversified general commercial, corporate, intellectual property, and litigation practice, with over 12,000 clients ranging from large multinational corporations and financial institutions to privately held companies, not-for-profit entities, and individuals in Thailand and abroad. When compared with other international firms in Thailand, Tilleke & Gibbins is unique because it has the expertise and legal sophistication to handle complex legal matters, yet it is local and possesses the cultural understanding and community base necessary to deliver practical and cost-effective results.