

Criminalisation of corrupt acts in the private sector

*Protecting integrity of the Vietnam Constitution, ensuring compliance with
UNCAC
and responding to demands to tackle corruption crimes in Vietnam*

Unequal judgement on corruption crimes due to inconsistent application of the law

According to the current Vietnam Penal Code, persons who hold positions or have authority such as director, deputy director, accountant or cashier and work in non-state enterprises, wholly foreign owned enterprises, venture companies with state's shares or joint stock companies can not be found guilty of corruption crimes.

In reality, individuals have paid bribe to persons working in non-state enterprises to obtain advantages for their organisations.

The lack of a legal framework to impose criminal sanctions on people receiving or offering bribe results in unequal treatment of corruption crimes.

Likewise, for property embezzlement committed by someone who is authorised to manage the misused property, the sanctions regulated by the current Penal Code are different when the offender is an officer or person with authority working in a non-state enterprise.

Protect the integrity of the Constitution and UNCAC

The United Nations Convention on Anti-Corruption (UNCAC), of which Vietnam has been a state party since 2009, requests its state parties to apply a number of anti-corruption measures in both the public and the private sector.

Regulations on corruption crimes in the current Penal Code, are not consistent with UNCAC regulations, particularly in relation to bribe offering and bribe brokerage and perpetrators of corruption crimes.

Vietnam needs to criminalise acts of corruption in the private sector to achieve a number of goals:

Compliance with the 2013 Constitution , which states, 'Actors of different economic sectors are equal, cooperate and compete with each other in accordance with the law' (Article 51.2).

Responding to demands to address corrupt acts involving property of companies with state shares and private ownership.

Standardising crimes in the Penal Code to ensure consistency, transparency, and alignment with international standards

Addressing corruption offenses in the private sector comprehensively and holistically, ensuring consistency in policies and between laws and enforcement.

Protecting the private sector labour force, ensuring fair and equal competition and significant values for the development of the private sector.

Identify bribe offering and bribe brokerage as corruption crimes

UNCAC lists bribe offering, bribe receiving and bribe brokerage acts as corruption offenses. However, both the current Penal Code and the draft amended Penal Code identify bribe receiving as a corruption crime, while bribe giving and bribe brokerage are classified as other position-related crimes.

Paragraph 181 of the UNCAC country review on Vietnam related to the implementation of Article 21.b – Bribery in the private sector. Evaluation experts recommended that: Vietnam needs to prioritise introducing legal regulations related to bribe offering and bribe brokering in the private sector, as the lack of these measures is a top challenge for the fight against corruption in Vietnam.

Therefore, in order to ensure feasibility in the enforcement of the Penal Code and application of anti-corruption measures, Vietnam needs to move bribe offering and bribe brokerage from “Other position-related crimes” to “Corruption crimes” in Chapter XXIII of the draft amended Penal Code.

Identify the perpetrators of corruption crimes

UNCAC lists perpetrators of corruption crimes as: national public officials, foreign public officials or officials working for international public organisations, and officials, regardless of their position, working for organisations in the private sector. However, the current Penal Code only lists cadres, public officials or persons authorised with public duties.

The draft amended Penal Code has introduced a number of amendments to comply with UNCAC, replacing the term “*public duties*” with “*duties*” in the definition of position-related crimes in Chapter XXIII. The definition of corruption crime that has been added in the draft, broadly contains corruption crimes in the private sector: “*Corruption crimes are offenses conducted by authorised persons on duties to gain personal benefits.*”

At the same time, the amended Penal Code also explains the legal term “person

with position” in a way that not only relates to election and appointment but also relates to the position of the perpetrators: *“The persons with positions are those who are assigned through appointment, election, contract or other arrangements, with or without salaries, to perform certain duties and have certain powers while performing such duties.”*

In addition to these changes in the revised Penal Code, the definition of institutions and organisations in the Anti-corruption Law also needs to be revised to include the non-state organisations and organisations that do not have state budget and property. This revision will ensure consistency across domestic laws and in prosecution procedures.

Take a first step: criminalisation of bribery and embezzlement in the private sector

Failing to consider the legal liability of corrupt acts in the private sector will mean the revised Penal Code lacks adherence to UNCAC and doesn't reflect the reality in Vietnam. Nonetheless, it is argued that criminalising all corrupt acts in the private sector will increase the number of corruption crimes (in both the public and the private sector), putting pressure on anti-corruption agencies and authorised persons who are fighting this type of crime. This could result in inefficiencies.

In order to tackle crimes properly in the political and socio-economic context of Vietnam, the legislative agencies suggest that Vietnam limit the scope of criminalisation according to UNCAC recommendations, i.e. bribery and embezzlement in the private sector.

Therefore, for now, the draft Penal Code specifies four offenses for position-related crimes in the private sector. These are: property embezzlement and bribe receiving (Article 366 and Article 367 in corruption offenses), bribe offering and bribe brokerage (Article 377 and Article 378 in other position – related crimes).

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