

LEGAL UPDATE

NEW VIETNAMESE PENAL CODE

1 January 2018 is an important date as the new Penal Code¹ finally came into force bringing the Vietnamese law more in line with international laws and introducing corporate criminal responsibility.

Corporate criminal responsibility for criminal offences such as insurance fraud, tax evasion, violation of competition regulations, terrorism financing, money laundering, pollution, manufacturing of counterfeit products and corruption is introduced, but not for bribery though, are introduced.

Some new offences, such as bribery within the private sector, are introduced. Finally, some crimes, such as breach of food safety regulations, pollution and insider trading, will be punished more heavily.

Note that violations on tax, competition, environment, business and trading which are not a crime, can be *administratively* sanctioned.²

Hereafter we will highlight key points of the new Penal Code.

1. When is a company criminally responsible?

For a company to be criminally responsible certain conditions need to be met.

The first requirement is that only apply corporate legal entity or commercial juridical person could be criminal responsible. According to the Civil Code “A *commercial juridical person means a juridical person whose primary purpose is seeking profits and its profits shall be distributed to its members and include enterprises and other business entities*”. Therefore, only to legal entities that make a profit could be criminal responsible, regardless of the business lines or nature of the company.

The second requirement is that the Penal Code provides that a corporate legal entity could be criminally responsible if can be proven that the criminal offence is:

- committed in the name *and* in the interests of the corporate legal entity; *and*
- is under instructions or approval of the corporate legal entity.³

The criminal prosecutor has to prove all these requirements before a corporate legal entity could be found criminally responsible. However, in the meantime interim measures⁴ could be applied.

2. What entity is criminally responsible?

The Penal Code applies to both *foreign* and *Vietnamese* corporate legal entities. However, for a *subsidiary*, the parent company will *not* be responsible as it is an independent entity, but for a *Representative Office or branch*, the parent company could be responsible as they are not independent legal entities.

In the Penal Code there is *no* provision on criminal offences committed in a *corporate group (parent and subsidiary)*. So, even though separate overseas corporate legal entities could be prosecuted, it is not clear yet under what conditions the foreign parent company could be hold criminally responsible for offences committed by directors, managers or representatives of local Vietnamese entities.

Also, important to realise is that in Vietnamese law there is no relevant provision dealing with the liability of directors or managers for not having adopted (intentionally or negligently) measures to prevent a crime. However, according to the Penal Code, any person (with some exceptions) who conceals a crime or who knows that a crime is being prepared, being carried out, or has been carried out but fails to report it could be criminally responsible.⁵

3. Who, what and where?

3.1 Vietnamese citizens and corporate legal entity

The Penal Code provides that any Vietnamese citizen or Vietnamese corporate legal entity may be held responsible for crimes defined under the code and committed either *inside or outside* of Vietnam.

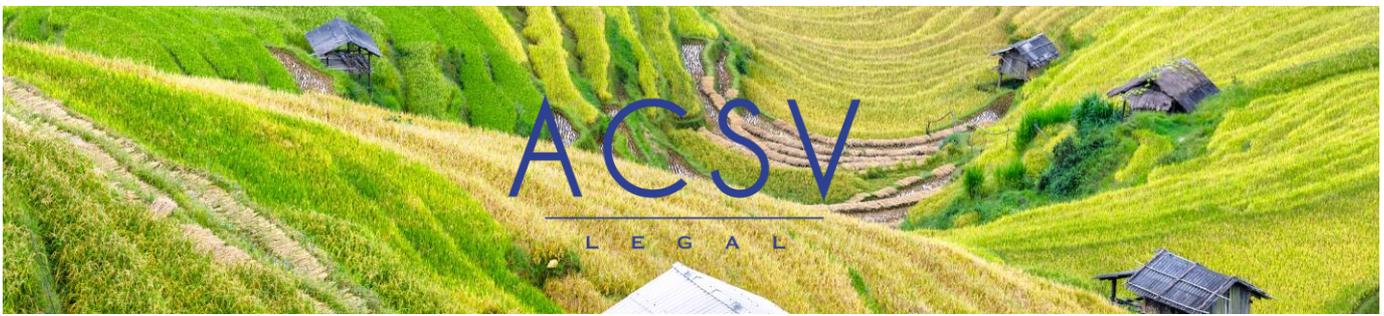
¹ The original law No. 100/2015/QH13 was adopted in 2015 and was amended in 2017 by Law No. 12/2017/QH14.

² See article 2.1 Law on Handling Administrative Violations.

³ Note that statute limitations apply, 5 years for less serious crimes, 10 years for serious crimes, and 20 years for very and extremely serious crimes.

⁴ Interim measures are for example: seizure of related assets, freezing of relevant accounts, suspension of the relevant legal entities' operations for a limited time, and imposition of pecuniary guarantee of the enforcement of sentences.

⁵ Misprision (article 390 of the Penal Code).



3.2 Foreign corporate legal entity

The New Penal Code also provides that a foreign corporate entity shall be subject to criminal responsibility for offences committed abroad if the offence infringes the lawful rights and interests of Vietnamese citizens or interest of Vietnam, or under an international agreement to which Vietnam is a signatory.

4. What crimes are relevant from a business perspective?

There are crimes that only would affect individual employees, but still could damage the business' reputation. Some crimes would affect the legal representative and others could result into corporate criminal responsibility if the earlier mentioned criteria under 1 are met.

4.1 Employees

Most relevant offences for individual employees without corporate criminal responsibility are environmental crimes, smuggling, bribery and corruption, money laundering, insurance fraud, terrorism financing, insider trading, production of and trading in counterfeit products, violation of the Law on IPR⁶, the Law on Food Safety and Hygiene, the Law on Accounting, the Law on Bidding, and the Law on Occupational Safety, Occupational Hygiene and Safety, abuse of power or position to influence another person for personal gain, commit fraud in the performance of duties, violations of regulations of business in multi-level marketing practices, and reveal work secrets, appropriate, trade or destruct work secret documents.

4.2 Legal representative(s)

In addition to the offences for individual employees, in case of violation of the Labour Code about dismissal or laying off staff, or forcing someone to resign, anti-competitive behaviour, or evasion of social, unemployment, health insurance payment the legal representative(s) can be charged with these offences.

4.3 Corporate legal entities

A corporate legal entity can be charged in case the criteria as set out under 1 are met, for tax evasion, insurance fraud, insurance evasion, environmental pollution, environmental emergency violation, IPR infringement, manufacturing of and trading in counterfeit foods, foodstuff or food additives, insider trading, anti-competitive behaviour⁷, publication of false information or conceal information in securities activities and terrorism financing.

The fact that a corporate legal entity has criminal responsibility does not exempt criminal responsibility of individuals.

5. Successor of convicted corporate legal entity

Note that if a convicted corporate legal entity is divided, separated, consolidated or merged, the succeeding corporate legal entity inherits rights and duties from the convicted corporate legal entity and will be responsible for any pecuniary penalties and damages.

6. Punishment and additional measures

Depending on the offence and the person or entity having committed the offence the punishments can be a monetary fine, restraining measures, a forced suspension or termination of business operations or a ban to conduct certain business activities and/or to raise capital. In case of aggravating circumstances punishments can be higher.⁸ Additional measures that can be applied are for example judicial measures⁹, interim measures, bans and confiscatory measures.

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⁶ It applies to copyright and industrial property rights.

⁷ Note that the competition law is being reviewed and that per early 2019 offshore activities having an impact on the Vietnamese market, and M&A deals between offshore entities and indirect equity interests in a Vietnam-based entity following are likely to fall under the scope of the Competition Law.

⁸ Aggravating circumstances can be but are not limited to recidivism, committed in a professional way or by a group, in case of abuse of power and position, committed in name of an agency or organisation.

⁹ Judicial measures are for example: confiscation or return of property, compulsory dismantlement of works, compulsory removal from Vietnam's territory, destruction of goods.