

# Managing change

## Client Alert Vietnam

Piercing the corporate veil - criminal liability of management positions

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### Piercing the Corporate Veil - Criminal liability of managerial level for actions of a commercial legal entity under the new Criminal Code of Vietnam

The new Criminal Code No. 100/2015/QH13 (“**the new Criminal Code**”) will officially come into effect on 01 July 2016. There are a number of articles and changes that have significant impact to operations of enterprises and management positions of enterprise in Vietnam. Besides the not so pressing potential Imprisonment for very rare because illegal termination proceedings, the new Criminal Code implements a principle widely known in civil law countries.

The principle of “**piercing the corporate veil**” was unknown in Vietnam until now, but is implemented in the new Criminal Code. This means that management positions are – if not exculpated – liable for criminal actions of the company.

#### 1. The Old Criminal Principle

The old Criminal Code No. 15/1999/QH10, amended by Law No. 37/2009/QH12 (“**the old Criminal Code**”), states criminal liability of managerial positions only to individuals and not legal entities. The principle of “piercing the corporate veil” was unknown to the old Criminal Code. Under this principle, individuals where the legal entity cannot be appropriately sentenced are sentenced for actions that fall into their duties.

In practice, there were a number of legal entities which intentionally (or unintentionally) committed serious violations causing high danger to the public and society order with the consensus of the management board and the owner of those legal entities.

**For example**, Vedan Vietnam, a company manufacturing and trading of monosodium glutamate, was found to have seriously breached legal regulations on environment protection which has caused serious damages to the surrounding environment and people. However, that company was only subject to administrative sanctions and compensation. It was found that since the management body acts for benefits and interests of the enterprise, not for the interest of themselves, it was not provided by the old Criminal Code to sentence individual criminal liability for those acts.

Understanding that current status, it is necessary to have a stricter Criminal Code to handle violation of legal entities with higher deterrence, and to not only stop at administrative handling like it was in the past.

#### 2. New Regulations in the Criminal Code

According to the new Criminal Code, there are 31 articles, including 5 new criminal offenses and 26 amended criminal offenses as listed in Article 76 of the Criminal Code which are not only applicable to individuals, but also to commercial legal entities (not applicable to non-commercial legal entities). This ultimately means that “piercing the corporate veil” has been implemented in Vietnam.

The crimes are classified into 02 main groups:

- (i) Group 1: Criminal offences against economics management order (22 name of crimes), including:
  - Criminal offences against legal regulations on manufacture, business and trade
  - Criminal offences in the field of taxation, finance, banking, securities, insurance.
  - Other criminal offences against economics management order.

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- (ii) Group 2: Criminal offences against legal regulations in the field of environment protection

With the implementation of this, every managerial position in a company is now facing the problem of being faced with a number of criminal liabilities. Depending on the type of Company, the criminal liabilities can **for example** include:

- Article 216 “Evading payment of social insurance, health insurance, unemployment insurance for workers”;
- Article 235 “Causing environmental pollution”.

Other, particularly tax liabilities are implemented into the new Criminal law.

Following points should be pointed out with regard to a potential criminal liability of a legal entity:

### a) **Conditions for a commercial legal entity to be subject to criminal liabilities**

A commercial legal entity shall only bear criminal responsibility if all of the following conditions are satisfied:

- (i) The criminal offence is committed in the name of the commercial legal entity
- (ii) The criminal offence is committed in the interests of the commercial legal entity;
- (iii) The criminal offence is under instructions or approval of the commercial legal entity– intentionally or unintentionally.

In case that a staff or management position abuses its position and powers to its own benefit, the legal entity and/or the General Director/Legal Representative potentially not subject to criminal liabilities.

### b) **Sentences against commercial legal entities committing crimes**

The following primary sentences are implemented in the laws:

- Primary sentences: (i) Fine; (ii) Suspension of operation; (iii) Permanent termination of operation of the legal entity.
- Additional sentences: (i) Prohibition from operating in certain fields; (ii) Prohibition from rais-

ing capital; (iii) Fine if no administrative penalties are imposed.

- The corporate legal entity shall incur only one primary sentence for a criminal offence committed and possibly one or more additional sentences.

### c) **Liability of related individuals in case that the commercial legal entity is subject to criminal liability.**

Now, after the implementation of the new Criminal Code, an important change is that if the Company is found to be subject to criminal liability, it is likely that **the General Director/legal representative, owner and/or the person in charge** is also subject to criminal liabilities.

Western countries with similar regulations have developed a complex principle of exculpation. It provides the opportunity to the individual to excuse itself for the criminal actions of the company. It might do so by for example:

- Providing evidence that it implemented processes and relevant precautions that a criminal incident does not happen.
- The individual was not able to prevent the incident due to collaboration of other individuals, or
- Other relevant excuses that are to be developed by the Vietnamese legal system.

Vietnam is currently at the stage of development where it will apply the principle that the representative of a commercial legal entity is assumed to know activities of any kind of the commercial entity. This will make it complicated to avoid the individual’s criminal liability in case of violation of the entity. The laws assume that no actions can be done by the legal entity without decisions made by managerial levels.

## 3. Conclusion

The new Criminal Code has criminalized a number of violations that are currently subject to only administration sanctions. The criminal liability of commercial legal entities and related individuals is a new regulation that will cause a significant impact to the operation of enterprises.

How the changes will be implemented is not fully clarified remains an issue that should be addressed by the Government and relevant authorities with a guidance.

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Companies and their managerial individuals have to prepare themselves for future developments of the new Criminal Code.

We strongly recommend to take precautions for the future and to ensure full compliance with all relevant regulations that are remotely in relation to the New Criminal code.

Such precautions are not impossible. They can be performed through (i) a sustainable setup at the beginning, (ii) process reviews or (iii) Compliance audits of relevant departments in the company.

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**Stefan Ewers, LL.M.**  
Associate Partner  
Attorney at Law (Germany)  
Registered Foreign Lawyer (Vietnam)  
Head of Ho Chi Minh City Office  
Phone.: +84 8 38 244 225  
E-Mail: stefan.ewers@roedl.pro

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14<sup>1</sup> Floor, Gemadept Tower,  
2Bis-4-6 Le Thanh Toni Street  
District 1, Ho Chi Minh City, Vietnam

**Responsible for the content:**  
**Stefan Ewers** | stefan.ewers@roedl.pro

**Layout/Type:** **Stefan Ewers** – stefan.ewers@roedl.pro

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