



Criminal liability for corporate legal entities under the regulation of Vietnam penal code

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Abstract

The Penal Code 2015, amended in 2017 (hereinafter referred to as Penal Code 2015) was approved by the National Assembly of the Socialist Republic of Vietnam at the 3rd session of the 14th National Assembly on June 20, 2017. It consists of 26 Chapters with 426 Articles, designed into 03 parts, the first part: General provisions (including 12 Chapters, from Article 01 to Article 107); the second part: Criminal offences (including 14 Chapters, from Article 108 to Article 425); and the third part: Implementation (including 01 Article - Article 426). Compared to the Penal Code 1999, it can be affirmed that the Penal Code 2015 has been revised and supplemented basically and comprehensively with the regulations on crimes and penalties in order to meet the demand of crime prevention in the new situation in Vietnam; one of the breakthroughs admendment and supplement in the Penal Code 2015 is the issue of criminal liability for corporate legal entities.

In this article, the author has an in-depth analysis of the necessity to stipulate the regulation on criminal liability for corporate legal entities under the Vietnam Penal Code 2015.

Keywords: criminal liability, penal code 2015, corporate legal entity

I. Introduction

After nearly 16 years of validity of the Penal Code 1999 (amended and supplemented in 2009), Vietnam has had a positive impact on the fight against crime, the protection and promoting the socio-economic development of the country, contributing positively to the work of building and firmly defending the Vietnamese Fatherland, protecting human rights, legitimate rights and interests of citizens. However, in addition to the positive and achievements, the internal impact of the socialist-oriented market economy has also generated the wrong side, which is the increasing crime situation and crime rate in both quantity and severity and dangerous nature for the society of criminal acts. In recent years, it is emerging some types of crimes committed by corporate legal entities such as economic crime, commercial crime, environmental crime... have left negative consequences, causing serious damage, especially for the living environment of the people in particular, the stable economic development, political security and social security of the country in general. However, there has been no regulation on criminal liability for *corporate legal entities*.

In the reality of the integration process with the market economy, there are some corporate legal entities, because of following the immediate profits, committing illegal acts of criminal nature and subject to criminal liability in some economic areas such as tax evasion, illegal trading, speculation, smuggling or having no legal measures to protect the environment causing serious consequences and extremely serious consequences.

Moreover, in recent years, there has been increasing situation of some entities hiding under the names of corporate legal entities to commit crime with higher level of danger and nature. Many legal violations which have criminal nature conducted by corporate legal entities are increasing such as smuggling, unfair competition, commercial fraud, industrial property rights infringement, crime in the stock market and especially in the areas of

environment, natural resources, causing very serious consequences, even extremely serious for society. The majority of these cases are carried out by the leading agency or the representatives of the corporate legal entities for the benefit of such corporate legal entities or within the framework of corporate legal entities activities with increasingly sophisticated and highly organized modus operandi, and even there are some international cases, causing serious damage to the country's socio-economy and people's lives, requiring us to have effective solutions to prevent.

In the context of international legal and judicial integration, Vietnam has become a member of many international conventions on crime prevention, such as the TOC Convention (United Nations Convention against Transnational Organized Crime and the Protocols Thereto) and as an APG member state, are responsible for fulfilling the recommendations of the Financial Action Task Force (FATF)... Moreover, under conditions of the more and more extensive international economic integration, there are more opportunities for Vietnamese enterprises to go abroad to invest and vice versa, if the national law only applies the mechanism of administrative sanction for corporate legal entities who commit crimes, then it will be unfair, because of the same serious violations that Vietnamese enterprises operating in foreign countries will be prosecuted according to the criminal law of the host country, but the Vietnamese and foreign enterprises operating in Vietnam which violate law are just only administratively fine.

Furthermore, the criminal liability of corporate legal entities is not a new issue because this has been recognized in other national criminal laws as well as international legal documents. In terms of national law, the issue of criminal liability of corporate legal entities has been criminalized in 119 countries in the world such as: the USA, Japan, China, England, France, Canada, Australia, Netherlands, Portugal, Finland, Kingdom of Belgium, Switzerland, Spain,

Slovakia, Hungary, Latvia, Croatia... in the 10 ASEAN countries alone, there are 06 countries that regulate this issue. These are: Singapore, Malaysia, Thailand, Philippines, Indonesia and Cambodia and especially China, which has many similarities in legislative tradition with our country, also has provisions on criminal liability for corporate legal entities.

By the time when the Penal Code 2015 (amended and supplemented in 2017) was enacted, there are no regulations on criminal liability for corporate legal entities. For the first time in the history of the formation and development of Vietnam's criminal law, the Penal Code 2015 has provisions on the criminal liability of corporate legal entities and is promulgated in Chapter XI, including 16 Articles (from Article 74 to Article 89) and in some other specific Articles and Clauses of the Penal Code (Articles 2, 3, 8, 33, 46). This is an outstanding new point, a breakthrough in Vietnam's criminal policy that changed the traditional perception about crime and punishment. It must be said that the supplementation of the regulation of criminal liability of corporate legal entities in the Penal Code 2015 derives from the urgent requirements of practice and it is the result of nearly 16 years (from 1999 to 2015) of persistent research and proposals of the Vietnam Government and approved by the Vietnam National Assembly to repair the shortcomings and limitations in dealing with legal violations of the corporate legal entities in recent years, especially violations in the economic and environmental sectors, as well as to protect of the rights of people affected by corporate legal entities violations during the past time.

II. The contents of the criminal liabilities of corporate legal entities in the Vietnam Penal Code 2015

Firstly, the criminal liabilities of corporate legal entities

In the current criminal law in Vietnam, there are no legislative definitions of criminal liability concepts. In fact, this concept is only mentioned by criminalists in criminal law science. Although the specific viewpoints are different, most of the viewpoints agree that the nature of criminal liability is the state's condemnation of criminal acts. By declaring certain behavior (of a certain degree of danger) as a crime and applying criminal enforcement measures to the subject who has committed the act. Thus, criminal liability is a measure of the State's impact on the subject of crime. As the subject of criminal law relations, the State has the right to investigate criminal liability and apply criminal enforcement measures to the subject of crime through law enforcement agencies.

On the basis of the above scientific arguments, the nature of the criminal liability of corporate legal entity is also the condemnation of the State for criminal acts that legal entities have implemented, reflecting the relationship between the state and legal entity who commits crime through the State's right to declare dangerous acts that legal entities carry out are crimes and have the right to apply criminal measures (including penalties and judicial measures) to legal entity in order to protect legal order and educate people to comply with the law. Criminal liability is a detrimental legal consequence that legal entity must bear, which is implemented by penalties, criminal justice measures and criminal convictions decided by the Court on behalf of the State for that legal entity because that legal entity has committed dangerous acts for the society in the

cases prescribed in the Penal Code. Also, in Article 2 of the Penal Code 2015: *“No corporate legal entity that commits a criminal offence that is not regulated in Article 76 hereof has to incur criminal liability”*.

Thus, it can be seen from the research that in the history of formation and development of Vietnam's criminal law, for the first time, there has been a basic regulation of penal liability for corporate legal entities, and this is also a premise that make the foundation for other provisions on criminal liabilities for corporate legal entities in the Penal Code in 2015.

It is also necessary to understand the concept of corporate legal entity in accordance with the spirit of lawmakers, it is only advisable to set the criminal liability for economic entities. Other legal entities or organizations that do not have legal status of entities, such as: (State agencies, political organizations, political-social organizations, social-occupational organizations, armed forces,...) are not subjects to criminal liabilities. On the other hand, according to the provisions of the Vietnam Civil Code 2015 in Article 74, Article 75 and Article 76, there are two types of legal entities, namely: corporate legal entities (including enterprises and other economic organizations) and non-commercial legal entities (including state agencies, people's armed forces units, political organizations, socio-political organizations, professional organizations, social organizations, socio-professional organizations, social funds, charitable funds, social enterprises and other non-commercial organizations). Also according to Clause 2 of Article 2 of the Penal Code 2015 on the basis of criminal liability: *“No corporate legal entity that commits a criminal offence that is not regulated in Article 76 hereof has to incur criminal liability”*. Thus, it can be understood that only legal entities associated with commercial activities are subject to criminal liability.

Starting from the fact in Vietnam over the last few years, recent cases of serious economic and environmental violations by the corporate legal entities have been increasingly sophisticated and caused serious consequences, such as the cases of Vedan Company (Dong Nai Province), Nicotex Company (Thanh Hoa), Formosa Ha Tinh (seriously or extremely serious affecting the Vietnamese environment). Therefore, the regulation of criminal liabilities for corporate legal entities is suitable to the practice to create a high deterrence to corporate legal entities' production activities that cause harm to the environment, economy and other fields in order to improving the effectiveness of the crime prevention that the subjects are corporate legal entities.

Secondly, the principle of handling corporate legal entity who commits crime

Clause 2 Article 3 the PENAL CODE 2015

- a. Every criminal offence committed by a corporate legal entity must be discovered promptly and dealt with quickly and fairly in compliance with law;
- b. All corporate legal entities that commit criminal offences are equal before the law regardless of type of business and economic sector;
- c. Criminal offences committed by deceitful methods; organized crimes, deliberate infliction of extremely serious consequences shall be strictly punished;
- d. Leniency shall be showed towards corporate legal entities that are cooperative during the proceeding,

voluntarily compensate for damage they inflict, proactively prevent or alleviate consequences.

Thus, the criminal handling of corporate legal entity is based on the four above principles, which clearly demonstrate the strictness of the law, while also demonstrating the flexibility in dealing with each type of criminal legal entity. As for criminal offenders, the State of Vietnam also has many leniency and humanitarian policies applied to corporate legal entity when they have legal basis. This is said to be the right way of the criminal law, and also shows that the punishment and leniency of the law are always parallel and clear. It can be considered a motivation for legal entity who commits crime to have self-repentance to seek leniency of Vietnamese law.

Thirdly, in case of foreign corporate legal entity that commits a criminal offence outside the territory of the Socialist Republic of Vietnam

In Chapter II of the Vietnam Penal Code 2015, there is a regulation of foreign corporate legal entity that commits a criminal offence outside the territory of the Socialist Republic of Vietnam shall face criminal prosecution. It is written in Clause 2 Article 6 of the Penal Code 2015: “*Any foreigner or foreign corporate legal entity that commit a criminal offence outside the territory of Socialist Republic of Vietnam shall face criminal prosecution as prescribed by this Code if such offence infringes the lawful rights and interests of Vietnamese citizens or interest of Socialist Republic of Vietnam or under a international agreement to which Vietnam is a signatory*”. The regulation of criminal liabilities for foreign corporate legal entity has demonstrated the legalization of the provisions of international treaties on crimes that Vietnam is an active member such as the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol, the Convention on Psychotropic Substances of 1971 and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988; The United Nations Convention against Transnational Organized Crime in 2000 and The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children in 2000; The United Nations Convention against Corruption in 2003; The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1984; and international treaties relating to counter-terrorism, terrorism financing, money laundering, piracy, hostage abduction... the legalization of foreign criminal offenses of foreign corporate legal entity helps our country protect territorial sovereignty as well as helps the economic exchange activities with other countries in the world to be equal, creating a motive power for the integration and sustainable development of our country.

Fourthly, concept of crime, punishment and judicial measures

Concept of crime: For the first time, the concept of crime has been expanded in the Penal Code 2015 including criminal offenses of corporate legal entity. In Clause 1, Article 8 of the Penal Code 2015, it is stipulated that: “*A crime means an act that is dangerous for society and defined in Criminal Code, is committed by a person who has criminal capacity or corporate legal entity, whether deliberately or involuntarily, infringes the sovereignty and territorial integrity of the nation, infringes the political*

regime, economic regime, culture, national defense and security, social order and safety, the lawful rights and interests of organizations, human rights, the lawful rights and interests of citizens, other aspects of socialist law, and leads to criminal prosecution as prescribed by this Code”. It can be said that this is a fundamental difference with Clause 1 of Article 8 of the Penal Code 1999, creating a solid legal basis to search for criminal liability for corporate legal entity, showing four characteristics of crime including the danger to society, against the criminal law, it is guilty, it must be punished and for the legal entity, it must also comply with the Article 74 of the Civil Code 2015.

Concept of sentence in the Penal Code 2015: Compared to the Penal Code 1999, the Penal Code 2015 has changed and added provisions on the concept of penalty in the direction of expanding the subject. It is written in the Article 30 the Penal Code 2015: “*A sentence means the most severe coercive measure of the State specified in this Code, taken by the Court against a person or corporate legal entity that commits a crime in order to deprive of or limit their rights and/or interests*”. At the same time, in the Penal Code 2015, it also stipulates that the purpose of penalties for corporate legal entity is not only to punish but also for the purpose of educating, deterring, contributing to the crime prevention, ensuring social safety and development, thereby contributing to ensuring fairness in handling criminal matters between individuals and corporate legal entity in accordance with the principle: “*Every crime committed by a person must be discovered promptly and dealt with quickly and fairly in compliance with law*”. On the basis of studying the law-making experience from other countries in the world and the practice of corporate legal entities commits crimes in Vietnam and the practical requirements of crime prevention, the Penal Code 2015 stipulates 02 types of penalties as main sentences and additional sentences, including:

Main sentences: Clause 1 Article 33 the Penal Code 2015: “*Primary sentences: a) Fine; b) Suspension of operation; c) Permanent shutdown.*”.

Additional sentences: Clause 2 Article 33 the Penal Code 2015: “*Additional sentences: a) Prohibition from operating in certain fields; b) Prohibition from raising capital; c) Fine if no administrative penalties are imposed*”.

Clause 3 Article 33 the Penal Code 2015: “*The corporate legal entity shall incur only one primary sentence for a criminal offence committed and possibly one or more additional sentences.*”.

The highlight in the regulation on penalties for corporate legal entity is that lawmakers concentrated on the economic penalty of legal entities, stemming from the main purpose of corporate legal entity is to operate for economic purposes and for profit. This is the direct matter which has the greatest impact on the existence and development of legal entities. At the same time, the types of penalties imposed by the Penal Code 2015 for corporate legal entity have been regulated as forms of handling violations for corporate legal entity in legal documents on sanctioning administrative violations in 2012... and many other legal documents. In fact, over the last few years, these forms of administrative sanctions are not enough to deter and educate, so they do not bring about high results in the prevention and fight against legal entities who violated the laws. Therefore, from the perspective of the penalties imposed by the Penal Code, bringing the highest regime of strict deterrent and coercion

will effectively contribute an important part in the process of fighting and preventing crimes caused by corporate legal entity.

Fifthly, Vietnam's legislative and technical qualifications in the Penal Code 2015 One of the most recent additions that shows Vietnam's legislative and technical qualifications in the Penal Code 2015 is that legislators have built a new chapter, namely Chapter XI "Regulations applied to corporate legal entities committing criminal offences" stipulating conditions and scope to bear criminal liability; penalties and specific judicial measures, the rules apply to criminal offenses of corporate legal entities; mitigating and aggravating factors of criminal liabilities; Decision on punishment, Combination of punishment, exemption of punishment, expungement of conviction for sentenced corporate legal entities. These regulations not only ensure the general consistency of the legal system but also to implement the commitments that Vietnam participates in international treaties, ensuring the fairness of Vietnamese corporate legal entities abroad and foreign corporate legal entities in Vietnam. Specifically, from Article 74 to Article 89, in which:

Regarding the conditions to be subjected to criminal liability of corporate legal entities: Article 74 of the Penal Code 2015 stipulates: "Application of Criminal Code to corporate legal entities committing criminal offences: *A corporate legal entity shall bear criminal responsibility according to this Chapter, other regulations of Part One hereof that do not contravene this Chapter*". This is a more specific provision for the provisions of Clause 2, Article 2 of the Penal Code 2015 on the basis of criminal liabilities for corporate legal entities. And also for the first time, the Penal Code establishes a provision that stipulates the conditions of penal liabilities for corporate legal entities, this is the necessary basis for the investigation of criminal liabilities in specific cases, ensuring the rationality and uniformity. and the feasibility, specifically in Clause 1, Article 75 of the Penal Code 2015, it stipulates the necessary and sufficient conditions to determine criminal liabilities for legal entities: "1. *A corporate legal entity shall only bear criminal responsibility if all of the following conditions are satisfied:*

- a. The criminal offence is committed in the name of the corporate legal entity;
- b. The criminal offence is committed in the interests of the corporate legal entity;
- c. The criminal offence is under instructions or approval of the corporate legal entity;
- d. The time limit for criminal prosecution specified in Clause 2 and Clause 3 Article 27 hereof has not expired".

That the Penal Code 2015 stipulates the above conditions have met the principles stipulated in Clause 2 of Article 2 and Clause 2 of Article 8 of the Penal Code 2015, so it avoids cases of criminal confinement or improper handling of criminal acts. The above conditions show that corporate legal entity is an independent entity, having the right to decide its own issues as stipulated in Article 74 of the Civil Code 2015. The noticeable new point in this content which is in Clause 2 of Article 75 of the Penal Code of 2015 stipulates "2. *The fact that corporate legal entity has criminal responsibility does not exempt criminal responsibility of individuals*". Therefore, in the process of applying and resolving criminal cases on charges of having

criminal liability provisions of corporate legal entities, the first thing it to clarify the facts, offenses and responsibilities of individuals or legal entities (if any), if the legal entity makes a decision or directs the individual to commit the offense, he/she must prosecuted both individuals and legal entity about the crime they have committed. In case of detecting a crime, but initially identifying the responsibility of the legal entity, prosecuting the case, prosecuting the legal person to commit a crime, then continuing to investigate and clarify the criminal case related persons, those who directly commit criminal acts, ensure the investigation of criminal liabilities for individuals and legal entities that are comprehensive and thorough, avoiding omiiting the crime and individuals and legal entities who commit crimes.

Regarding the scope of criminal liability and the type of crime that corporate legal entity must bear criminal liability in the Penal Code 2015: This is a new issue, so the determination of criminal offenses that corporate legal entities must bear criminal liability in Criminal Code 2015 shows the caution, on the basis of assessing the nature and extent of danger and dissemination of acts of violation occurring in practice to stipulate in the Criminal Law to handle criminal acts appropriately. Stemming from the requirements of practical crime prevention, on the basis of selective reference to international experiences, surrounding countries, determine the scope of the crimes committed by corporate legal entities which only belongs to groups of economic and environmental crimes, these are the offenses that corporate legal entities often violates (popularity) and that has a certain degree of danger and is easy to prove in practice. In that spirit, Article 76 of the Penal Code 2015 stipulates 31 crimes, of which 22 are in Chapter XVIII – Economic crimes and 09 crimes in Chapter XIX - Environmental crime, if committing one of these offenses, PNTM must bear criminal liability, specifically:

In Chapter XVIII of the Penal Code 2015 – Economic offences, there are 22 crimes that the corporate legal entity have to bear criminal liability, including provisions in Clause 1 Article 76 of the Penal Code 2015. In Chapter XIX – Environmental offences of the Penal Code 2015, there are 09 crimes that the corporate legal entity have to bear criminal liability, including provisions regulated in Clause 2 Article 76 of the Penal Code 2015.

In the practice of crime prevention in recent years, in general, these crimes committed by corporate legal entities have taken place with complicated nature and increasingly dangerous level of criminal acts and causing great damage for the society and the people caused by legal entities is very large. At the same time, in accordance with the international treaties that Vietnam has participated in as an active member, such as The United Nations Convention against Transnational Organized Crime in 2000, The United Nations Convention against Corruption in 2003, The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children in 2000; international treaties on terrorism and anti-terrorist financing... The common point in 31 crimes applied to corporate legal entity is the parallel regulation of criminal liability of individual people with the criminal liability of corporate legal entity.

Regarding forms of penalties, types of penalties, judicial measures and conditions applicable to criminal legal entities: Compared to the Penal Code 1999, the Penal Code

2015 has a completely new development and it is the first time a regulation is prescribed specific ways of penalties and judicial measures for new subjects of criminal law which is legal entity, namely the provisions of Articles 77 to 82 of the Penal Code 2015 include: fine (Article 77), Suspension of operation (Article 78), Permanent shutdown (Article 79), Prohibition from operating in certain fields (Article 80), Prohibition from raising capital (Article 81) and Judicial measures taken against corporate legal entities committing criminal offences (Article 82).

In addition, the Penal Code 2015 supplemented with one new points for corporate legal entity: Decision on punishment for commitment of multiple criminal offences (Article 86); Combination of punishments of multiple judgments (Article 87); Exemption of punishment (Article 88); Expungement of conviction (Article 89). If it is compared to the expungement of conviction for individuals, the scope of expungement of conviction for corporate legal entity is much lower, because of the nature, the extent of danger and the great consequences caused by the criminal offense of the corporate legal entities to the society. So narrowing the scope of expungement of conviction also shows the deterrence and strictness in dealing with criminal offenses of expungement of conviction.

Regarding the regulation of the circumstances to mitigate and aggravate criminal liabilities for corporate legal entity: Because corporate legal entity is the subject of criminal law, therefore, as well as the regulation of criminal liabilities for human individuals, one of the new points of the Penal Code 2015 compared to the Criminal Code 1999 is the first time that the Criminal Law stipulates mitigating factors and criminal responsibility of corporate legal entity (Article 84), and Aggravating factors applied to corporate legal entities (Article 85), in which there is principle provision: *“If a circumstance defined as a mitigating factor this Code is the basis for determination of a crime or punishment bracket, it shall not be considered a mitigating factor in the decision on punishments”*. Until now, the tradition of building the Criminal Law all stipulates the aggravating and mitigating circumstances for individuals who commit specific offenses, now the Penal Code 2015 continues to amend and supplement the types of law subjects which are corporate legal entities, it must also regulate aggravating circumstances, mitigating circumstances applicable to corporate legal entities who commit crimes, as still prescribed for individuals who commit crimes. Through this regulation, it can be seen that the regulation of aggravating and mitigating circumstances in the Penal Code 2015 clearly shows the severity in handling the criminal offenses of the corporate legal entities, as well as showing the socialist humanity the Vietnam Communist Party and State in the fight against crimes. At the same time, it demonstrates the rationality and principles of fairness and equality in handling crimes between two types of legal subjects: individual and corporate legal entity.

Thus, with the addition of the provisions on criminal liability for corporate legal entities, it marked a significant change in the legislative work in Vietnam today in the process of judicial reform initiated and led by the Party, this has important meaning in tightening the legal framework during the period of Vietnam's international economic integration. Crime not only caused by individuals but also by corporate legal entities and needs to be strictly punished. Although the investigation of criminal liabilities for

corporate legal entities is a new issue added in the Criminal Code 2015 and Vietnam has no practical experience on this regime. Therefore, in the work of crime prevention, the tasked forces need to clarify the circumstances, offenses of individuals or corporate legal entities (if any), and the case of corporate legal entities to make decisions or direct individuals to commit criminal acts, it is necessary to handle criminal cases of both individuals and corporate legal entities on the offense they have committed. If so, the handling of new criminals is thorough and comprehensive, avoiding the neglect of individuals and corporate legal entities criminals.

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