



COMPLIANCE IN VIETNAM: THE CRIMINAL LAW ASPECT

FOREIGN EXECUTIVE'S EXPOSURE TO CRIMINAL INVESTIGATION IN VIETNAM

The number of foreign executive staff in Vietnam has seen a surge over the last years. Foreign nationals are shifting the centre of their professional and personal lives to Vietnam in order to manage and supervise the companies' operations in the domestic market. But with this commercial responsibility also comes legal liability for the company's conduct while doing business in Vietnam. This Newsletter sheds some light on potential criminal liabilities of foreigners living and working in Vietnam and intends to raise risk awareness.

Legal framework. While it is clear that every country will enforce their legal framework and prosecute the violation of laws, it is not a secret that criminal offenses are amongst the most sensitive issues, especially while living in a foreign country. Vietnam can be perceived as a benign and almost "gentle" environment, which it certainly is because of its cultural heritage. When it comes to criminal proceedings, however, foreigners staying in Vietnam will oftentimes be confronted with an uncomfortable and harsh reality. One does not need to draw on political stereotypes to understand that the Socialist Republic of Vietnam has very particular interests in upholding civil order and keeping commercial enterprises under scrutiny. This rings even more true in all cases in which these companies bear some degree of foreign investment. Most of the regulations concerning the criminal offenses on Vietnamese territory and the conduct of criminal procedures are contained in the 2015 Criminal Procedure Code ("**CPC**") and 2015 Penal Code ("**PC**") that entered into effect on 1 July 2016. These two laws provide an extensive account of rights and duties of all parties in a criminal investigation procedure, which may be brought to the indictment of a suspect.

The different stages of investigative procedure. Persons facing criminal proceedings are classified into four groups, roughly aligned with the respective stage of the criminal litigation cycle. These categories include:

The *Denunciated* (persons against whom a criminal complaint has been made) has not yet been put into custody, but is awaiting further investigation into the case to establish an accusation or release (Art. 57 CPC).

Detainees are persons who have been arrested in case of emergency, after being caught in the act of committing a crime or upon the execution of an outstanding arrest warrant, and who are now in custody (Arts. 58 and 59 CPC).

The **Accused**, or persons against whom formal criminal proceedings have been initiated (Art. 60 CPC) – this means the individual will be subject to in-depth investigation and interrogation.

Defendants, or persons who are placed on trial as a result of not having criminal charges dismissed by the Prosecutor or by the Court during an earlier stage of the proceedings (Art. 61 CPC).

Carefully distinguishing this terminology is crucial, mostly because to each category of person in a criminal investigation particular rights will be provided, the realm of which tends to increase as the case gets closer to trial.

Criminal Liability of Companies in Vietnam. As much as natural persons, enterprises – as long as they are considered to be juridical persons (Art. 74 of the Civil Code and 60 (1) CPC) under Vietnamese law (i.e. Limited, Joint Stock Company, etc.) – can also be subject to criminal investigations. Differently to natural persons, juridical persons, however, cannot possibly bear the same duties and rights as an accused individual. To name an example of this special role, enterprises cannot give personal testimony or account of a crime and they can also not be detained.

This particularity puts the accused company's executive staff in the line of fire, during criminal investigations into a company's conduct and operations, in order to establish a criminal case. Not only will they be summoned by the investigative authorities and interrogated about the facts and circumstances of a particular case. They will also be subject to respective sanctions (cf. below), which can affect them severely and have an enormous negative impact on these staffs' lives, assets and families.

Legal Representatives' rights and duties. Every enterprise has a legal representative, which will represent the entity in any act where the juridical person itself can, due to its "artificial" nature, not act on its own behalf. The same is also true for criminal procedures and investigations: the prosecution will not tempt to summon the company – it will naturally summon those who are most likely to be able to give testimony about certain facts and relations, which are needed to establish a criminal case against the company (Art.61 (1) CPC). Conversely, the CPC devises a principle of direct representation in criminal proceedings: "*The rights and duties of juridical persons as suspects are executed by their legal representatives according to this Law.*" (Art. 60 (1) CPC).

It is important to bear in mind that the respective laws do not limit investigative authorities (Police, Prosecution and the Procuracy) to the interrogation or prosecution of the legal representatives of a company. In fact, there is hardly a limit with regard to the prerogative of who the entrusted authorities deem factually involved or otherwise able to give testimony in order to establish the “truth of the case” in question. Finding and corroborating this “truth” is the ultimate goal of all criminal investigation and trial, which provides the investigative authorities with ample discretion as to who to question about what, for how long and under which circumstances. This means that, in a case where it is deemed necessary to, for example, get first-hand information about a company’s financial setup, they will consider summoning the CFO for testimony, or whoever else they deem the most promising source of information with regard to particular events.

Summons for interrogation. Whenever a foreigner is summoned by the police for an interview about a criminal incident which has come to the authority’s attention, there will be some reluctance on the individual’s side to comply with such order. Even if it is a “harmless” matter, or the individual is only summoned as a witness to a crime that he is not accused of himself, these sorts of appointments are usually not of the desirable kind, moreover, if they are conducted in a language, which the individual is regularly not proficient in: Vietnamese. It thus becomes a very crucial question, whether or not a summoned individual – regardless of the purpose of the summons – needs to attend such appointment. To answer this question, a number of different scenarios will have to be distinguished:

- a) Invitation by the Police to be interrogated (“Giấy mời” – Engl: “Invitation letter”)
- b) Warrant requesting appearance of individual (“Giấy triệu tập” – Engl: “Summons letter”)

In case an individual receives a document entitled as under a), there is the option to not follow such invitation. This letter will be issued in early cases of investigations into a potential crime, against either a witness or a suspect (i.e. also: the Denunciated). Non-compliance with such invitation will not be sanctioned. It will, however, be have to be evaluated on a case by case basis, if attendance of an individual is commendable or not in this stage of an investigation.

If a formal (court-approved) warrant as described under b) is issued against an individual, this means that a case has been opened by the competent district attorney. This is equivalent to the summoned individual to have passed from the status of “Denunciated” to formally “Accused” and will be enforced by coercive measures, in case of non-compliance with such request.

A summoned person may be willing to mandate another person (e.g. a knowledgeable Vietnamese assistant or co-worker) to attend this interrogation on his behalf, by means of a Power-of-Attorney

("PoA"). While there is an abstract possibility to provide a PoA for an associate, in order to avoid having to attend the interrogation in person it is, however, merely a theoretical question in most cases, as the Denunciated, Detained, Accused, Defendant will always have to be personally present at the occasion of the interrogation. This is the logical consequence of the above-referenced idea that the criminal investigation serves the examination and establishment of "the truth". Since any representation is hardly ever as "good" as first-hand testimony, the police will regularly reject such PoA and insist on the personal appearance of the summoned individual.

A person who has been merely "invited" by the investigation authorities, might be more able to convince the authority of the expendability of his/her attendance by deploying a representative endowed with a PoA for this purpose.

Any individual will, however, be able to insist on an interpreter to be present during the time of the interrogation. In constellations, in which an individual is summoned as a witness and there is another person who is capable of giving the same first-hand testimony of fact to the authorities, a PoA might be accepted. These situations are, however, also the ones who yield the least risk for the summoned individual – compliance with authoritative orders in a criminal procedure should generally be complied with, unless in a case of emergency.

The Defendant's rights. Within a criminal investigation, the protagonist (in the form of the Denunciated, Detainee, Accused and Defendant) has unalienable rights, which provide a scope of protection every Defendant or witness should be familiar with:

- a) *To Remain Silent:* One of the more substantial rights in the CPC is the right to remain silent during custodial police interrogations. This is a manifestation of the "fair trial principle", which has been laid down in Vietnamese criminal law in 2015. The right to remain silent - or as contained in the CPC, "*the right not to be forced to provide statement against themselves or to plead guilty*" - is made applicable to all classes of detained persons in the CPC, including detainees, the accused and defendants. The accompanying right to be informed that silence is an option is also provided in Art 60 (2) (b) CPC.
- b) *To consult a lawyer:* The accused individual has a right to be represented consulted by an attorney, or another individual of his/her choice (Art. 16 CPC and Art. 31 (4) of the The Constitution of the Socialist Republic of Vietnam).
- c) *To Review Evidence Maintained by the State:* Another fundamental right of the Defendant contained in Art. 60(2) (i) CPC is the right to review and/or copy evidence related to their case. This comprises

the right to review not only the evidence that the prosecutors intend to use to prove a defendant's guilt, but also exculpatory evidence, or evidence that points to the defendant's innocence.

- d) *To Present Evidence and Opinions*: An advanced and comprehensive system of criminal justice is dependent on the right of both the prosecution and the defense being endowed with the ability to present and comment on evidence under consideration. This right, as set forth in Art. 60 (2) (e) and (g) CPC allows Defendants and their lawyers to use the evidence they become aware of under the right to review, to establish facts in their favour in the trial.

Personal criminal liability of executive staff. A core question of foreign executives in responsible positions in Vietnam is the scope of personal criminal liability they might be subjected to. In some jurisdictions in the region, especially those with a similar political setup, criminal liability of a company may be projected onto responsible executives, regardless of their personal contribution to the violation. Vietnam, however, has approximated its interpretation of criminal liability to Western standards in separating personal liability of executive staff from the direct liability of a company's conduct. Art. 75 (2) CC defines that "[t]he fact that [a] corporate legal entity has criminal responsibility does not exempt criminal responsibility of individuals", which allows the reverse conclusion that personal and corporate liability are to be treated as disjointed. Executive staff will be held personally liable for criminal misconduct in connection with business activities, only if the individual in question has personally fulfilled all conditions for criminal liability under Vietnamese law.

Art. 76 CC ("*Scope of criminal responsibility of corporate legal entities*") enumerates all criminal offenses in which a juridical person can be considered delinquent. These crimes are mostly related to financial and economic offenses, which reflects the reality of corporate crime.

Possible sanctions. Any individual accused in a criminal procedure might be subject to a number of sanctions entitled "preventive measures" in the terminology of the CPC. Thus "[c]ompetent procedural authorities and persons within their powers can implement measures of emergency custody, arrest, temporary detainment, detention, bail, surety, residential confinement [and] exit restriction". Art. 126 CPC also devises so-called "coercive measures" in the form of "[...] *coercive delivery, forced escort, property distraintment or freezing of accounts, in order to maintain intra vires activities of charge filing, investigation, prosecution, adjudication, sentence enforcement.*"

From of the above enumeration, the measures of "*exit restriction*" and "*property distraintment or freezing of accounts*" are probably the most daunting and irksome. It can be equivalent to being unable to return to your home country and even restrict an individual's access to personal assets, such as bank accounts

or (im)moveable property.

Consular Support. The Vienna Convention on Consular Relations of 1963, granted accession by Vietnam on 8 September 1992, is an international treaty, which also gives some guidance on what support a national can obtain from his respective Embassy or Consulates General. Therein, Article 36 specifically addresses communications between consular officers and nationals of the sending state. The Convention provides that "*consular officers shall be free to communicate with nationals of the sending State and to have access to them [...]*" and that foreign nationals who are arrested or detained be given notice "*without delay*" of their right to have their embassy or consulate notified of that arrest. In such situation "*consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation.*"

Conclusion. Briefly, in Vietnam the exposure of executive staff to criminal liability is clearly limited to unlawful acts which are based on such individual's (own) violation of the law. Company crimes will not be allocated to the responsible individual within the entity, unless there is evidence for personal criminal misconduct according to Vietnamese criminal law. It is, however, vital to evaluate each situation on a case-by-case basis and to carefully consider the circumstances.

Mitigation of exposure in this regard can mean the installation of internal compliance mechanisms, to prevent unlawful conduct within the company. Whenever faced with criminal investigations, either as a witness or a suspect, it is important to know your rights. We recommend drawing on consular support whenever necessary and to build and maintain open channels of communication with the respective representation of your national state. Additionally, the preparation of a legal defence crisis team as a pre-emptive measure is also a commendable investment in order to ascertain the security of your staff and the company's assets.

Please feel free to contact us for questions or more information: snb.vietnam@snblaw.com.