

Some Inadequacies of the Judicial Record Card in The Establishment and Management of Enterprises and Improvement Recommendations

Dr. Cao Nhat Linh

Faculty of Law - Can Tho University, Vietnam

nhatlinh@ctu.edu.vn

Abstract

The 2020 Enterprise Law stipulates many cases where individuals are not allowed to establish and manage enterprises, including cases where individuals are being examined for penal liability, are detained, are serving prison sentences or are banned by the Court from holding specific posts, practising certain professions or doing specific jobs, or in other cases as prescribed by the Bankruptcy Law. In these cases, the business registration agency has the right to request the enterprise founder to submit a Judicial Record card when applying to establish and manage the enterprise. However, this regulation has some shortcomings that need to be studied for further improvement.

Keywords: Judicial record card, establishment and management of enterprises, criminal prosecution, prohibition from practising certain professions or doing specific jobs, bankruptcy law.

1. INTRODUCTION

According to current regulations, enterprise founders and managers must only add a Judicial record card to an enterprise registration file if requested by the business registration agency. However, the business registration agency only applies this requirement in a few lines of business with conditions on security and order. It means that the business registration agency cannot thoroughly examine the cases where the abovementioned enterprises are not established and managed. Furthermore, passing Judicial record checks to determine whether an individual's legal status is subject to criminal prosecution is challenging. Therefore, it is essential to continue researching and perfecting the relevant regulations on Judicial record cards in business registration documents, ensuring that the Law's provisions are well implemented.

1. Legal Review of Entrepreneurial Law

The economic transition of Vietnam started with the transition to a socialist market in the 1980s, which allowed for significant growth and improvement in the business environment. The transition set the pace for the development of contemporary entrepreneurship in Vietnam, which included the strong integration of Vietnam into the global economy through the facilitation of resources, technology, and advanced knowledge¹. In the past few decades, the country has seen a transformation of the business environment, which has paved the way for the development of trade relationships through trade partnerships and the evolution of the laws governing the conduct and performance of businesses. Consequently, the country has experienced a significant boom in entrepreneurship.

Vietnam has enacted significant reforms to the entrepreneurship laws to attract more foreign investments. In 2014, the country formulated a new law to replace the Law on Investment and Enterprise of 2005. The economic transformation and reforms of the country in the 20th century saw the economic growth of the country gravitate towards foreign investments and exports. As of 2019, the country achieved a 210% rate for trade flows which was the highest value for developing countries. The development of entrepreneurship policies in Vietnam dates back to 2001 when the country introduced a clause in the National Law governing the definition and performance of small and medium enterprises by introducing an SME development agency. Since its introduction, the agency has been held responsible for the governance of legal bandwidth for the operation of SMEs through taxation, financing, and value chain development. The introduction of the SME development council in 2001 and its revamp through the years has sought to create and promote the performance of SMEs through coordination and the introduction of entrepreneurship policies.

Following the beginning of the economic transition, the lawmakers and entrepreneurs in Vietnam upheld the traditional theory of entrepreneurial Law to separate legal persons from crimes committed by their entities. In light of this, entrepreneurs and investors were considered separate beings from the business enterprise and, therefore, could not be held criminally liable for crimes. However, the concept changed in 2015 following the promulgation of the 2015 Criminal Code established by the National Assembly. The new Criminal Code included a corporate criminal liability clause.

The introduction of the 2020 Entrepreneurial Law addressed the types of companies and businesses allowed to operate within Vietnam, outlining

¹ OECD Forum, “SME and Entrepreneurship Policy in Viet Nam,” *OECD Studies on SMEs and Entrepreneurship*, 2021, <https://doi.org/10.1787/30c79519-en>.

the legal requirements on operations, conduct, and governance. The new Law sought to introduce reforms in the regulations on the establishment, operation, and governance of corporations and companies in Vietnam. One of the major aspects of the Law is the removal of official controllers in limited liability companies². Previously, sole proprietorships owned by a corporate member and multiple-member LLCs owned by eleven or more members were required to appoint an inspector committee to oversee the corporation's governance. However, under the new Law, the institutions have been given more leeway by removing the appointment of official controllers as an operational requirement. The new Law also allows multiple member LLCs to issue bonds, a provision blatantly missing from the 2014 law of Enterprises. This has facilitated the development of more opportunities through which investors can reach the institutions without dealing with complex power structures.

Under previous laws, the business environment in Vietnam was considered significantly hectic, especially due to complex administrative procedures. For instance, changes in business registration information were required to be conducted and reported to the licensing authority for registration. The new Law, however, eliminates such procedures thus making it easier for mergers, acquisitions and amalgamations, which has increased the market growth³.

The 2014 law of Enterprises outlined clear guidelines on the regulations regarding the issuance of bonds by private stock companies, which clearly outlines the issuance and transfer process. The 2020 law, however, expounded on the regulations by defining the atmosphere and requirements for the performance and operations of corporate bond issuers and investors. In this regard, the Law incorporated numerous regulations, especially for private joint stock companies, which set out the guidelines for the institutions' operations.

One of the key changes enacted by the 2020 entrepreneurial law is the changes in the shareholders' definition, roles, and rights. In 2014, the minimum voting threshold for shareholders in joint stock companies was 51%. However, the 2020 reforms have reduced the threshold to 50%, thus allowing shareholders with 50% or more to sit in and approve

² Ellena Brunetti and Romain Stimpfling, "New Vietnamese Law On Enterprises: Blog," AJAI, October 18, 2021, <https://www.master-ajai.com/articles-juridiques-des-etudiants-de-l-ajai/articles/new-vietnamese-law-on-enterprises>.

³ Foreign Investment Agency, "Vietnamese New Law on Enterprise," FOREIGN INVESTMENT, December 1, 2021, <https://fia.mpi.gov.vn/en/Detail/CatID/f9b6d842-d373-4799-9abe-bd242253f19b/NewsID/176edc02-e020-47c0-8914-2b2c6c94d23c#:~:text=Minority%20shareholder%20protection,a%20General%20Meeting%20of%20shareholders>.

minor issues in shareholder meetings and pass resolutions through the collection of written opinions. However, the minimum threshold for major decision-making meetings remains at 65%, as outlined in the 2014 entrepreneurial law.

Under the 2014 Law of Enterprises, ordinary shareholders were required to hold their shares for at least six months before they were awarded general shareholder rights. The new reforms of 2020 changed the stipulation, allowing any shareholder to be accorded similar rights. According to the new prose, any shareholder with at least 5% ordinary shares must be treated equally to those with 10% shares. However, ordinary shareholders with less than 10% are exempted from nominating the members of the Board of Directors. Additionally, the preference shareholders receive statutory protection under the 2020 entrepreneurial law concerning their rights. On this note, under the 2020 entrepreneurial law, the preference shareholders are awarded limited participation rights, allowing them to attend and vote in meetings wherein the resolutions under discussion affect their rights, duties and obligations. In such a situation, the resolutions affecting preferred shareholders are only passed and executed when supported by 75% or more of the members with preferred shares⁴. This allows the shareholders to be more heard and included in the company's decision-making processes.

The 2020 law of entrepreneurship also amended the private placement procedures. In light of this, the Law stipulates that in any case where a private joint stock company seeks to issue new shares through private placement, the existing shareholders are entitled to an opportunity to weigh in on the issuance of shares, which is their pre-emptive right. However, the right is limited in the case of issuance of rights related to mergers and amalgamations.

2. If an individual is examined for penal liability, is detained, is serving a prison sentence or is banned by the Court from holding certain posts, practising certain professions or doing specific jobs.

One of the principles applied to handling business registration procedures is that *“The person who establishes an enterprise or an enterprise declares the enterprise registration dossier by himself and is responsible before law for the legality, truthfulness and accuracy of the enterprise registration dossiers and reports”*⁵. In addition, the person

⁴ Nhan, Phan Vhin, and Oh Hsiu Hau. “Vietnam Passes New Law on Enterprises, Strengthening Protection for Shareholders.” Allen & Gledhill, October 2, 2020.

⁵ Article 4 of Decree No. 01/2021/ND-CP, dated January 4, 2021, on business registration

establishing an enterprise must commit: *“They are not prohibited from establishing and managing an enterprise according to the provisions of the Enterprises Law; and take responsibility before law for the legality, accuracy, and truthfulness of the above business registration content”*⁶.

According to the provisions of the 2020 Enterprise Law, one of the cases in which an individual does not have the right to establish and manage an enterprise in Vietnam is that *“A person who is being examined for penal liability, detained, is serving imprisonment, are serving administrative handling measures at compulsory detoxification establishments, compulsory education institutions or are being banned by the Court from holding certain posts, practising certain professions or doing certain jobs; other cases as prescribed by the Bankruptcy Law and the Anti-corruption Law”*⁷. Furthermore, to apply and check the cases in which this enterprise cannot be established and managed, the 2020 Enterprise Law further stipulates: *“In case the business registration authority requests, the person registering the establishment of an enterprise shall submit the Judicial record card to the Business Registration Agency”*⁸.

This regulation currently makes the business registration agency fall into a passive position, unable to check all the cases of banning the establishment and management of enterprises mentioned above. Because of the following reasons:

Firstly, although the Judicial record card is intended to support the management of business registration, establishment, and management of enterprises⁹, the Judicial record card is optional in all cases in the business registration dossier. However, according to the above provisions, at the request of the business registration authority, the person registering or establishing an enterprise is obliged to submit a Judicial record card to the business registration agency. Therefore, if the business registration agency does not request it, the person establishing the business must not submit a Judicial record card.

This regulation will create different interpretations and applications between business registration offices in different localities. Although practically applied, only a few business lines and lines have conditions for security and order; the business registration agency may require adding a Judicial record card in the enterprise registration dossier. Because, for these industries and professions, the person who *“has been*

⁶ Application for enterprise registration attached with Circular No. 01/2021/TT-BKHDT, dated March 16, 2021, guiding business registration.

⁷ Point e), clause 2, Article 17 of the 2020 Enterprise Law

⁸ Point e), clause 2, Article 17 of the 2020 Enterprise Law

⁹ Nguyen Minh Phuong, *Purpose of judicial record management concerning Judicial record cards*, <https://moj.gov.vn/qt/tintuc/Pages/nghien-cuu-trao-doi.aspx?ItemID=2543> (accessed on February 3, 2023)

criminally prosecuted and investigated, prosecuted or adjudicated by Vietnamese or foreign procedural agencies...” will not be allowed to be a person responsible for the security and order of the business establishment¹⁰. Therefore, almost all business registration agencies do not require a Judicial record card submission if the registered business line does not belong to the group of business lines, and business lines are subject to security and order conditions.

Secondly, in the case of a request to submit a Judicial record card, the content does not contain any information indicating that the individual is being examined for penal liability or has been detained at the time of criminal prosecution before trial and conviction¹¹. Because the Judicial record card only records information about the criminal status and information about prohibition from holding certain positions, establishing and managing enterprises or cooperatives under the bankruptcy law¹². In other words, if the person establishes and manages the business for the first time, the information related to penal liability in the Judicial record card is only information about the Judicial record. Therefore, the business registration authority cannot determine whether the person applying for the establishment of an enterprise is being examined for criminal liability at the early stage (the prosecution stage of the accused).

In short, the Enterprise Law stipulates that people who are “*under criminal prosecution*” are not allowed to establish and manage enterprises. Nevertheless, checking this case against establishing this individual's business is impossible or asynchronous. Therefore, it can be said that this inspection has almost been assigned to post-inspection work. Because at present, the business registration agency does not have a national database to check this legal status when processing the application file for issuance or change of the business registration certificate.

Therefore, Vietnamese Law must have clear and specific guidelines when an individual is “subject to criminal prosecution”. Specifically, since that individual is decided to prosecute or since the Procuracy has approved the decision to prosecute that defendant. At the same time, it is necessary to promulgate a regulation on communication between the business registration agency and the competent investigating agency and the People's Procuracy in updating the decision and the legal value

¹⁰ Clause 2, Article 7 of Decree No. 96/2016/ND-CP, dated July 1, 2016, stipulating security and order conditions for several conditional investment and business lines.

¹¹ Do Thi Thuy Lan, *Regulation on the issuance of curriculum vitae No. 2 - practical problems*, <https://moj.gov.vn/qt/tintuc/Pages/nghien-cuu-trao-doi.aspx?ItemID=2253> (accessed on February 3, 2023)

¹² Articles 42 and 43 of the 2009 Judicial Record Law

of the decision to prosecute the accused and whether the individual's legal status is in custody or serving a prison sentence. Because as analyzed above, the Judicial record card does not have any recorded information about the legal status being examined for criminal liability of the individual establishing the business.

Also, according to the provisions of the 2020 Enterprise Law, *“organizations that are commercial legal entities prohibited from doing business or operating in certain fields under the provisions of the Penal Code”* will not be allowed to establish businesses. in Viet Nam¹³.

Thus, to apply this regulation, the business registration agency must apply the provisions of the Penal Code to determine. Accordingly, the penalties for commercial legal entities committing crimes include main and additional penalties. The main penalties include a) Fine, b) Suspension of operations for a definite time, c) Permanent suspension of operations. Additional penalties include a) Prohibition from doing business or from operating in specific fields; b) Prohibition from capital mobilization; c) Fine, when not applied as the main penalty¹⁴. The penalty of *“Prohibition from doing business or from operating in specific fields”* is applied when it is found that allowing a convicted commercial legal entity to continue doing business or operating in that field may cause danger to human life, health or society. Therefore, the Court decides that specific areas are prohibited from doing business or operating¹⁵. The time limit for banning business or activities in specific fields is 01 to 03 years from the date the judgment takes legal effect¹⁶.

From the above provisions, *“organizations that are commercial legal entities prohibited from doing business or operating in certain fields under the provisions of the Penal Code”* is a case where a commercial legal person has already committed a crime subject to a main penalty and may be subject to an additional penalty of *“Prohibition from doing business or from operating in specific fields”*¹⁷. In other words, if a commercial juridical person commits a crime and is not subject to the aforesaid additional penalty, that commercial juridical person still has the right to establish and manage an enterprise under the 2020 Enterprise Law if such juridical person still has the right to establish and manage an enterprise is still active. For example: If a commercial legal

¹³ Point g), clause 2, Article 17 of the 2020 Enterprise Law

¹⁴ Article 33 of the 2015 Penal Code

¹⁵ Court Journal, *Regulations on the execution of criminal judgments for commercial legal entities*, <https://tapchitoaan.vn/quy-dinh-ve-thi-hanh-an-hinh-su-doi-voi-phap-nhan-thuong-mai> (accessed on March 1, 2023)

¹⁶ Article 80 of the 2015 Penal Code

¹⁷ Bach Ngoc Du, *Criminal prosecution of criminal commercial legal entities*, <https://tapchitoaan.vn/truy-cuu-trach-nhiem-hinh-su-doi-voi-phap-nhan-thuong-mai-pham-toi> (accessed on March 1, 2023)

entity commits a crime, only the main penalty of a fine and the additional penalty of “Prohibition from capital mobilization” is applied, that commercial legal entity is still not prohibited from establishing and managing an enterprise according to the current Enterprise Law. It means that only when that commercial legal entity is subject to the additional penalty of “*Prohibition from doing business or from operating in specific fields*” will it lose its right to establish enterprise management while applying additional penalties. However, this provision can create two different interpretations:

The first understanding is that this commercial legal entity no longer has the right to establish and manage an enterprise. In other words, this commercial legal entity does not have the right to invest as a founding member or shareholder of a new enterprise.

The second understanding is that this commercial legal entity does not have the right to establish and manage a new enterprise when the new enterprise has a business registration in the lines, trades and fields in which the Court bans this commercial legal entity from doing business banned from the operation.

The second understanding will be more reasonable because the commercial juridical person is still doing business in the industry, profession or field where the commercial juridical person can still establish a new business in the lines and professions. Because if the commercial legal entity registers to do business in many fields, the remaining fields that are not prohibited will be allowed to continue doing business. For instance, a commercial legal entity deals in accommodation and food services. The Court only prohibits that commercial legal entity from doing business in accommodation services but does not ban the business of catering services; that legal entity still has the right to operate the food service business. Thus, in this case, that commercial legal entity still has the right to establish a new business to provide food and beverage services and other services that are not tourist accommodation services. However, according to the first interpretation, in this case, if based on the 2020 Enterprise Law, a legal person is not entitled to establish and manage an enterprise, including establishing and managing a food and drink service business enterprise.

Therefore, the provisions at point g), clause 2, Article 17 of the 2020 Enterprise Law on preventing “*organizations that are commercial legal entities prohibited from doing business or operating in certain fields under the provisions of the Penal Code*” from establishing and managing enterprises is unreasonable and clear. From this shortcoming, point g), clause 2, Article 17 of the 2020 Enterprises Law should be amended and supplemented: “*Organizations that are commercial legal entities prohibited from doing business or operating in specific fields when an enterprise is established with business registration to operate in the*

lines, professions and domains in which such legal entity is prohibited under the provisions of the Penal Code”.

In addition, according to current regulations, updating the “legal status of enterprises” in the National Database of Business Registration only includes statuses such as: “Suspension of business”, “No longer doing business at the registered address”, “The certificate of business registration has been revoked due to coercion on tax administration”, “In progressing procedures for dissolution, division, consolidation or merger”, “In the process of bankruptcy”, “Dissolved, bankrupted, ceased to exist”, “Operating”¹⁸. Thus, in the national database on Vietnam's business registration, it is impossible to show the status of enterprises being banned from doing business or operating in specific fields. Therefore, Vietnamese Law must add this legal status to the National Database of Business Registration (for commercial legal entities as enterprises) and databases that manage other commercial legal entities, such as cooperatives, unions of cooperatives, etc. to create more favourable conditions for the business registration office where the commercial legal entity registers to establish an enterprise more favourable in checking the conditions establishment and management of businesses of commercial legal entities.

3. In case the enterprise is not allowed to establish and manage an enterprise after the enterprise or cooperative is declared bankrupt.

According to the 2014 Bankruptcy Law, if an enterprise or cooperative is declared bankrupt for no reason of force majeure, the person holding the position of President, General Director, Director or member of the Board of Directors of the enterprise with 100% state-owned capital declared bankrupt may not hold such positions in any state-owned enterprise from the date the 100% state-owned enterprise is declared bankrupt. In addition, the State's capital contribution representative in a state-owned enterprise declared bankrupt may not hold managerial positions in any state-owned enterprise. Moreover, suppose a person holding a managerial position in an enterprise or cooperative declared bankrupt intentionally violates Clause 1 in Article 18, clause 5 in Article 28, and Clause 1 in Article 48 of the Bankruptcy Law. In that case, the Judge shall consider and decide on the disqualification of the right to establish an enterprise or cooperative or act as a manager of the enterprise or cooperative within 03 years from the date the People's Court issues the decision declaring bankruptcy¹⁹.

The above cases belong to the group of cases that are not allowed to establish and manage enterprises under the 2020 Enterprise Law and may be required by the Business Registration Authority to submit a

¹⁸ Article 41 of Decree No. 01/2021/ND-CP, dated January 4, 2021, on business registration

¹⁹ Article 130 of the 2014 Bankruptcy Law

Judicial record card to prove that they do not belong to the cases when an individual applies for business registration ²⁰.

According to the 2009 Law on Judicial Records, the provision stipulating that Vietnamese courts ban Vietnamese citizens and foreigners in bankruptcy declaration decisions from holding certain positions, establishing or managing enterprises or cooperatives took effect ²¹.

Thus, if the business registration agency does not require the business registrant to submit a Judicial record card, it is impossible to determine whether that person is currently banned from holding certain positions, establishing or managing an enterprise or cooperative according to the provisions of the Law on bankruptcy or not. Because, in the national information system on business registration, the information note about the declared bankrupt enterprise only shows, “*Dissolved, bankrupted, ceased to exist*”. Bankruptcy is the legal status of an enterprise that has a court decision to declare bankruptcy following the bankruptcy law and has been updated by the Business Registration Office on the international database on business registration. Thus, it is difficult for other local business registration offices to determine whether the founder of an enterprise is a person who once managed an enterprise that has been declared bankrupt and is currently banned by the Court from holding certain positions, establishment and management of enterprises or cooperatives in deciding whether to declare bankruptcy or not.

Therefore, on the national business registration portal, it is advisable to integrate data on the names of business managers who are banned from establishing and managing enterprises according to the Court's decision to declare bankruptcy judgment. At that time, it will be unnecessary to ask the founders and managers of the enterprise to submit a Judicial record card. It will reduce one procedure in the enterprise establishment dossier. In addition, it increases Vietnam's business start-up index in the World Bank (World Bank) rankings ²².

4. Conclusion

Regulations on the right of the business registration agency to request the submission of a Judicial record card to check whether the legal status of an individual is in the case of being banned from establishing and managing a business at present is not precise. Since then, the application practice has not been in line with localities in requiring or not requiring submission of this form if no provision of specialized Law

²⁰ Point e, clause 2, Article 17 of the 2020 Enterprise Law

²¹ Clause 3, Article 5 of the 2009 Judicial Law

²² Vu Dung, *Improving Business Start-up Index: Much to Do*, <https://www.qdnd.vn/kinh-te/cac-van-de/cai-thien-chi-so-khoi-su-kinh-doanh-nhieu-viec-can-lam-609861>, (accessed on February 10, 2023)

requires it. Therefore, to improve Vietnam's business start-up index, the Enterprise Law should remove the requirement to submit a Judicial record check in the business registration file. Instead, the Law and guiding documents should stipulate the regulation of interconnection and connection in sharing data about an individual's legal status so that the business registration agency can independently check the information and digitized data connected from relevant agencies without asking the enterprises' founders and managers to submit Judicial record cards.

REFERENCES

- [1]. Brunetti, Ellena, and Romain Stimpfli. "New Vietnamese Law On Enterprises: Blog." AJAI, October 18, 2021. <https://www.master-ajai.com/articles-juridiques-des-etudiants-de-l-ajai/articles/new-vietnamese-law-on-enterprises>.
- [2]. Foreign Investment Agency. "Vietnamese New Law on Enterprise." FOREIGN INVESTMENT, December 1, 2021. <https://fia.mpi.gov.vn/en/Detail/CatID/f9b6d842-d373-4799-9abe-bd242253f19b/NewsID/176edc02-e020-47c0-8914-2b2c6c94d23c#:~:text=Minority%20shareholder%20protection,a%20General%20Meeting%20of%20Shareholders>
- [3]. Nhan, Phan Vhin, and Oh Hsiu Hau. "Vietnam Passes New Law on Enterprises, Strengthening Protection for Shareholders." Allen & Gledhill, October 2, 2020. <https://www.allenandgledhill.com/sg/publication/articles/16971/passes-new-law-on-enterprises-strengthening-protection-for-shareholders#:~:text=Vietnam%20passes%20new%20Law%20on%20Enterprises%2C%20strengthening%20protection%20for%20shareholders,-2%20October%202020&text=On%2017%20June%202020%2C%20Vietnam,effective%20from%201%20January%202021>
- [4]. OECD Forum, OECD Forum. "SME and Entrepreneurship Policy in Viet Nam." OECD Studies on SMEs and Entrepreneurship, 2021. <https://doi.org/10.1787/30c79519-en>
- [5]. 2020 Enterprise Law
- [6]. Decree No. 96/2016/ND-CP, dated July 1, 2016, stipulating security and order conditions for several conditional investment and business lines.
- [7]. Decree No. 01/2021/ND-CP, dated January 4, 2021, on business registration.
- [8]. Circular No. 01/2021/TT-BKHDT, dated March 16, 2021, guiding business registration.
- [9]. Nguyen Minh Phuong, Purpose of judicial record management concerning Judicial record cards, <https://moj.gov.vn/qt/tintuc/Pages/nghien-cuu-trao-doi.aspx?ItemID=2543> (accessed on February 3, 2023)
- [10]. Do Thi Thuy Lan, Regulation on the issuance of curriculum vitae No. 2 - practical problems, <https://moj.gov.vn/qt/tintuc/Pages/nghien-cuu-trao-doi.aspx?ItemID=2253> (accessed on February 3, 2023)
- [11]. Court Journal, Regulations on the execution of criminal judgments for commercial legal entities, <https://tapchitoaan.vn/quy-dinh-ve-thi-hanh-an-hinh-su-doi-voi-phap-nhan-thuong-mai> (accessed on March 1, 2023)

- [12]. Bach Ngoc Du, Criminal prosecution of criminal commercial legal entities, <https://tapchitoaan.vn/truy-cuu-trach-nhiem-hinh-su-doi-voi-phap-nhan-thuong-mai-pham-toi> (accessed on March 1, 2023)
- [13]. Vu Dung, Improving Business Start-up Index: Much to Do, <https://www.qdnd.vn/kinh-te/cac-van-de/cai-thien-chi-so-khoi-su-kinh-doanh-nhieu-viec-can-lam-609861>, (accessed on February 10, 2023)