

Amendment of the Company Law and the Capital Market Law by the New Criminal Code

As of 1st of February 2014, Romania's New Criminal Code has come into force further to years of legislative debates aimed at adjusting the provisions of the criminal law to the requirements of social, economic and political life. Even though not easily visible to the naked eye, the enactment of the New Criminal Code has produced a series of collateral effects, in the sense that a number of amendments have been made to, among other laws, the Romanian Company Law no. 31/1990, as subsequently republished and amended ("**Company Law**").

In line with the changes brought to the criminal legal framework, there is a general tendency to reduce the **sanctions** applicable for the crimes provided by the Company Law. More specifically, the minimum and maximum incarceration periods have been lowered and, in most of the cases, the criminal fine has been introduced as an alternative to a custodial sentence.

One of the most important amendments made to the Company Law by the New Criminal Code is the regulation of more extensive restrictions with respect to **companies' founders**. Under the former version of the Company Law, these restrictions were limited to a series of crimes that were set out individually. For instance, previously, a person convicted for breach of trust, fraudulent management or use of forged documents could not set up a company. In line with this former approach but in a more extensive manner, the New Criminal Code extended these restrictions to a large category of offences, such as property related crimes connected to breach of trust (e.g. breach of trust, breach of trust by defrauding creditors, fraudulent management, fraudulent bankruptcy, fraudulency, etc.) and crimes related to forged documents (such as forgery of official documents, forgery of private documents, use of forged documents, false statements, etc.). The effect of such extension is that new crimes lead to the incapacity of a founder, such as insurance related fraud, public auction related fraud and taking advantage of a vulnerable person for financial gain. Moreover, unlike the previous provisions, persons who have been convicted for crimes of corruption (e.g. taking or offering bribes, influence peddling, etc.) or for tax evasion may not be founders of companies.

Furthermore, one of the critiques of the former sanctioning regime was the insufficient coverage with respect to the **persons leading or representing** a company who commit crimes as set out in the Company Law. The amendments brought by the Criminal Code extend the category of these persons to also cover the members of the directorate and of the supervisory board in the case of companies organized based on the two-tier system. More specifically, pursuant to the Company Law as amended by the New Criminal Code, members of the directorate and the supervisory board in case of companies organized based on the two-tier system can now be penalised if they are found guilty of having committed the specific crimes as set out in the Company Law (e.g. if they present false information regarding the company to the public or if they take advantage of the company's assets by using them in their own interest, etc.). As a downside, even though the legislators intended to cover as many offenders as possible, these punishments still appear to be inapplicable to the shareholders of limited liability companies or joint-stock companies.

The amendments brought by the New Criminal Code also provide for a **series of new crimes**. Firstly, it created a new crime related to “financial assistance”, i.e. the action of the director, general manager, manager, member of the directorate or the supervisory board or of the legal representative of a company who constitutes guarantees in conditions other than the ones provided by the law. Under the creation of this new crime, any form of “financial assistance” becomes a crime, not only the previous regulated ones of granting loans or advances with respect to the shares of the concerned company. Pursuant to another new crime covered by the New Criminal Code, the legal representatives of a company such as the ones mentioned above will be also face punishment if the criminal prosecution has been commenced with respect to the company at stake and, in the meantime, they enforce certain resolutions of the general meetings of shareholders (with respect to change of the legal form of the company, merger, spin-off, dissolution, reorganisation or the share capital decrease) without informing the competent judiciary body or by breaching the prohibition imposed by the latter.

Last but not least, the New Criminal Code **repeals a couple of crimes**. Firstly, the person that carries out business activities in the name and on behalf of a foreign company without complying with the legal provisions for its appropriate operation in Romania will not be held liable anymore under the Company Law. Secondly, the registration of a company based on false articles of association will no longer be considered a crime under the Company Law. This does not mean that the respective actions are not prohibited anymore; it is just that they are sanctioned by way of other laws (e.g. the New Criminal Code, etc.).

The New Criminal Code has also made several amendments to the Capital Market Law no. 297/2004, as subsequently amended (“**Capital Market Law**”), among which are incapacities similar to the ones provided by the Company Law with respect to founders that were stipulated in respect of significant shareholders and members of the management bodies of a financial investment services company. The general trend of regulating certain crimes more coherently and mitigating the related sanctioning regime is followed in the case of the amendments made to the Capital Market Law as well (e.g. with respect to some of the crimes, the criminal fine, previously provided as an alternative sanction to imprisonment, has been removed and the complementary sanction of forbidding certain rights has been introduced).

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