

CRIMINAL LIABILITY OF COMPANIES UNDER ROMANIAN LEGISLATION

1. GENERAL CRIMINAL LIABILITY OF THE COMPANIES UNDER ROMANIAN LEGISLATION

General Conditions of Criminal Liability of Companies

All legal persons (with the exception of the state and public authorities) are liable for criminal offenses perpetrated while carrying out their main activity or when acting in the interest or on behalf of the legal person. Public institutions are not liable for criminal offenses perpetrated while carrying out an activity that cannot be subject to the private sector. The criminal liability of a legal person does not exclude the criminal liability of the natural person which contributed to the offense.

Criminal Penalties Applicable to Companies

The penalties applicable to the companies are principal and ancillary. The principal penalty is a fine, ranging from RON 100 and RON 3,000,000 (approx. EUR 25 to EUR 650,000).

The ancillary (complementary) penalties are: a) dissolution of the legal person; b) suspension of the activity regarding one or more of the activities of the company for a period of 3 months to 3 years; c) the closure of certain points of work of the company for a period of 3 months to 3 years; d) Prohibition to participate in public procurement procedures for a period of one to three years; e) placement under judicial supervision; f) displaying or publishing of the conviction decision.

2. THE INVESTIGATIVE AUTHORITIES

Criminal law enforcement is carried out by prosecutors and police officers acting under the supervision of a prosecutor (both of them referred to as criminal prosecution bodies). Independent of the investigating bodies, the prosecutor is the one who establishes the indictment and decides if the company should be prosecuted and sent before a court in order to be judged for the alleged criminal offense(s).

According to specific regulation and in order to ensure high quality of investigation skills for business crimes, the competence of police officers for business crimes is attributed to the Service/Directorate for Investigating Economic Crimes.

Furthermore, particular business crimes are investigated by two specialized Prosecutor's Offices belonging to the High Court of Cassation and Justice: (i) the National Anti-Corruption Directorate (which deals with business crimes related to corruption or against

the European Union's interests); and (ii) the Organized Crime and Terrorism Investigation Division (e.g. business crimes such as fraud with a prejudice of over RON 2,000,000 – approximately 445,000 EUR – offenses under Law no. 297/2004 regarding the capital market or money laundering in connection with business crimes stated under the provision of E.G.O. 78/2016). Each of these offices has both central (national) and territorial structures.

3. CORPORATE CRIMINAL LIABILITY – IS THE ENTIRE COMPANY LIABLE FOR CRIMINAL OFFENSES?

Regardless of whether a person acts in the name and on behalf of the company (either as a regular employee or as a manager), an individual triggers the criminal liability of the company if he/she perpetrates the offense when carrying out the company's main activity, or is acting in the interest or on behalf of the company.

However, the criminal liability of the company does not exclude the criminal liability of the individual participating in the offense.

Practice has shown the investigators usually jointly pursue both the company and the individual(s) which took part in the offense, since there are higher chances of recovering damages. However, following the criminal investigation, the company often becomes bankrupt and therefore the individuals are typically the only resort for recovery of damages.

Moreover, the prosecutor often orders a restraint on the company's assets, to prevent them from being transferred.

4. MERGER OR ACQUISITION CONTEXT. WHEN DOES SUCCESSOR'S CRIMINAL LIABILITY APPLY?

In case of loss of legal personality by merger, absorption or demerger occurring after the offence is committed, the criminal liability (along with the consequences thereof) will be charged against :

- (a) the legal entity resulting from the merger;
- (b) the absorbing legal entity; or
- (c) those companies resulting from the demerger or the acquired parts of the estate of the initial company subject to the demerger.

In the cases identified above, the consequences of the offense are directly proportional to the share capital transferred to the subsequent companies or the successor company.

5. WHAT INFORMATION AND DOCUMENTS CAN THE INVESTIGATIVE BODIES OBTAIN DURING A CRIMINAL INVESTIGATION?

The Investigative bodies (in certain cases, only the prosecutor exclusively has this right) can:

- (a) demand anybody (either the targeted person/entity under investigation or any third person/entity) to submit or issue any kind of document;
- (b) search for and seize any existing objects and documents;
- (c) order immediate seizure of computer data, (including data referring to traffic) that were stored by means of a computer system, or
- (d) use surveillance or special investigation methods, such as:
 - (i) wiretapping of communications or of any type of remote communication;
 - (ii) accessing an electronic system;
 - (iii) video, audio or photographic surveillance;
 - (iv) tracking or tracing using technical devices;
 - (v) obtaining data regarding financial transactions of individuals;
 - (vi) withholding mail deliveries or search of such mail;
 - (vii) use of undercover agents and informants;
 - (viii) authorized participation in specific criminal investigation activities;
 - (ix) assisted delivery; and
 - (x) obtaining stored and generated data from operators, such as telecom and internet providers, etc.

If a certain document is relevant for the criminal investigation, the company or a third party must provide it voluntarily to the investigative bodies. Otherwise, one who refuses to cooperate with the investigative authorities can be fined or a search warrant can be issued in order to search and seize those documents. A search warrant relating to a company's premises, vehicles or computers requires the court's prior ruling relating to such. In some cases, a refusal can be considered obstruction of justice, which is a significant criminal offense.

If the document or computer data is secret or confidential, disclosure or surrender is done under conditions that ensure secrecy or confidentiality. A complaint may be filed by any interested person opposing the seizure or the manner in which it is implemented.

6. PARTICULARITIES REGARDING THE LEGAL ADVISOR OF THE COMPANY

A search warrant for a lawyer's domicile or office can only be ordered by the prosecutor on the basis of a mandate issued by the court. In order to ensure professional secrecy, the communications between the lawyer and his client cannot be obtained by the investigators. Moreover, if among the evidence gathered from the search the investigators find such attorney-client privileged communications, they are not allowed to use it as valid evidence in court, and are obliged to destroy it immediately.

The following privileged documents are excluded as evidence by the investigators:

- (a) documents containing or related to communications between a lawyer and his client; and
- (b) documents containing statements made by a lawyer on matters relating to the defense of a client.

The business relationship between a lawyer and the person or company that he/she assists or represents cannot be subject to technical surveillance, unless there is evidence that the lawyer is committing or is preparing to commit an offense other than that for which the company is being investigated.

7. BURDEN OF PROOF AND ESTABLISHING THE GUILT OF THE COMPANY

According to Romanian legislation, the burden of proof lies on the prosecutor and other criminal investigative bodies, while the defendant has the right to remain silent, if he/she so chooses.

However, when an offense is committed as the result of ignorance or misleading knowledge of its illegal character or due a circumstance that could not have been avoided in any way, the company is exempted from the criminal sanctions. It may however in some cases pay the damages which resulted from the offense. Moreover, an act which would usually be considered an offense will not be considered as such when committed by a person who was unaware at that time of the existence of a state, situation or circumstance that would determine the criminal nature of the act.

8. COOPERATION PROVISIONS / LENIENCY / WHISTLEBLOWING

Whistleblowing can be a reason for non-punishment of an offense committed by a company or an individual.

Another reason for non-punishment of such a crime is a withdrawal of previous false testimony, before: (i) the defendant's detention or protective custody/arrest; (ii) the commencement of the criminal action; or (iii) in other cases before a decision or other solution is given following such false testimony.

The applicable law also states that in certain cases and depending upon the type of offense, only a reduction of the punishment by 50% is possible and not full clemency.

April 2018

About WOLF THEISS

Wolf Theiss is one of the leading law firms in Central, Eastern and Southeastern Europe (CEE/SEE). We have built our reputation on a combination of unrivalled local knowledge and strong international capability. We opened our first office in Vienna almost 60 years ago. Our team now brings together over 340 lawyers from a diverse range of backgrounds, working in offices in 13 countries throughout the CEE/SEE region.

For more information about our services, please contact:



Bryan W. Jardine

Partner

bryan.jardine@wolftheiss.com

T: +40 21 308 8100



Alexandru Roman

Associate

alexandru.roman@wolftheiss.com

T: +40 21 308 8100

This memorandum has been prepared solely for the purpose of general information and is not a substitute for legal advice.

Therefore, WOLF THEISS accepts no responsibility if – in reliance on the information contained in this memorandum – you act, or fail to act, in any particular way.

If you would like to know more about the topics covered in this memorandum or our services in general, please get in touch with your usual WOLF THEISS contact or with:

Wolf Theiss Rechtsanwälte GmbH & Co KG
Gheorghe Polizu 58-60
13th floor, sector 1, 011062
Bucharest

T: +40 21 308 81 00
F: +40 21 308 81 25
bucuresti@wolftheiss.com

www.wolftheiss.com